

No. 16394

United States
Court of Appeals
for the Ninth Circuit

MAYFLOWER INSURANCE EXCHANGE,
Appellant,

vs.

ROBERT DEAN GILMONT, ROSE MARIE
GILMONT and RONALD A. WATSON,
Guardian ad Litem for Susan Rose Gilmont,
a minor, Robert Russell Gilmont, a minor and
Norman I. Gilmont, a minor, Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

JUN 30 1959

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Portland 4, Oregon,

Attorneys for Appellees.



In the District Court of the United States
for the District of Oregon

No. Civil 9405

MAYFLOWER INSURANCE EXCHANGE,
Plaintiff,

vs.

ARTHUR ALLEN McKINZIE, ROBERT DEAN
GILMONT, ROSE MARIE GILMONT, SU-
SAN ROSE GILMONT, ROBERT RUS-
SELL GILMONT, and NORMAN L. GIL-
MONT, Defendants.

COMPLAINT FOR DECLARATORY
JUDGMENT

Comes now the plaintiff and for its complaint for
declaratory judgment alleges:

I.

That plaintiff is a corporation duly organized and
existing under the laws of the State of Washington
and all of the defendants are citizens of the State
of Oregon. That the matter in controversy exceeds,
exclusive of interest and costs, the sum of \$3,000.00.

II.

That defendants Robert Dean Gilmont and Rose
Marie Gilmont are husband and wife and the de-
fendants Susan Rose Gilmont, Robert Russell Gil-
mont and Norman L. Gilmont are their minor chil-
dren.

III.

That on or about April 16, 1957 at Portland, Oregon, defendant Arthur Allen McKinzie made application to the plaintiff for a policy of insurance covering defendant Arthur Allen McKinzie in the operation of a certain 1951 Cadillac coupe automobile, motor No. 516262287, Oregon license #4G-2710, and insuring against public liability for personal injuries arising out of the operation of said automobile with limits of \$10,000.00 for injuries to any one person and \$20,000.00 for injuries arising out of any one accident, and against property damage with limits of \$5,000.00. That a copy of said written application is attached hereto marked "Exhibit A" and by this reference made a part hereof as if fully set forth herein. That subsequent to receipt of and in reliance upon the statements and representations made in the written application of defendant Arthur Allen McKinzie for said insurance (Exhibit A), the plaintiff issued to him a certain policy of insurance No. 174380, a copy of which is attached hereto marked "Exhibit B" and by this reference made a part hereof as if fully set forth herein.

IV.

That on or about June 8, 1957, at a point on U. S. Highway No. 20 about 6.5 miles East of Toledo, Oregon, in the State of Oregon, the defendant Arthur Allen McKinzie, while operating said motor vehicle covered by said insurance policy, was involved in a collision with an automobile owned and operated by defendant Robert Dean Gilmont,

said collision resulting in personal injuries to defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont, and damage to the automobiles owned respectively by the defendants Arthur Allen McKinzie and Robert Dean Gilmont.

V.

That defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont have retained an attorney and are demanding that defendant Arthur Allen McKinzie and plaintiff respond in damages for the injuries sustained by said defendants; that defendant Arthur Allen McKinzie is claiming that plaintiff is obligated under the terms of said policy, Exhibit B, to provide a defense for said defendant in any action that may be brought against him for damages arising out of the aforementioned accident and to pay any judgment that may be rendered against him within the limits of said policy.

VI.

That during the course of investigating said accident plaintiff discovered that defendant Arthur Allen McKinzie had made misrepresentations to the plaintiff in his application for said insurance (Exhibit A) in that he had answered in the negative questions as to whether his driver's license had been revoked or suspended and whether he had received any driving charges, citations or fines in the three years prior to the date of his application for

said insurance. That in truth and in fact the defendant Arthur Allen McKinzie's driver's license had been suspended in the State of Oregon under date of February 14, 1956 for a period of one year and on February 14, 1957 this one-year suspension was continued for an additional period of one year from that date, and that said driver's license had not been reinstated in the State of Oregon at the time defendant Arthur Allen McKinzie made application for said insurance. That in truth and in fact defendant Arthur Allen McKinzie was convicted in the District Court of the State of Oregon, County of Benton, on February 14, 1956 for the traffic offense of "no muffler".

VII.

That plaintiff would not have issued the aforementioned policy of insurance (Exhibit B) had it known the true state of facts and if the defendant Arthur Allen McKinzie had correctly answered the questions put to him on said written application (Exhibit A). That as soon as the plaintiff learned of the aforementioned fraudulent representations of the defendant Arthur Allen McKinzie it notified defendant Arthur Allen McKinzie of its decision to rescind the policy issued to him as of the date of issue and tendered its check in full refund of all premiums paid thereon.

VIII.

That plaintiff contends that no valid policy of insurance has ever been issued by it to defendant

Arthur Allen McKinzie; that the purported policy of insurance Exhibit B, was null and void and of no force and effect and that plaintiff is not obligated to provide a defense for defendant Arthur Allen McKinzie in any action that may be brought against him or to pay any judgment that may be rendered against him arising out of or connected with the aforementioned accident of June 8, 1957.

Wherefore, plaintiff prays for a declaratory judgment as follows:

1. That policy No. 174380 issued by plaintiff as of April 16, 1957 was null and void as of the date of its issue.

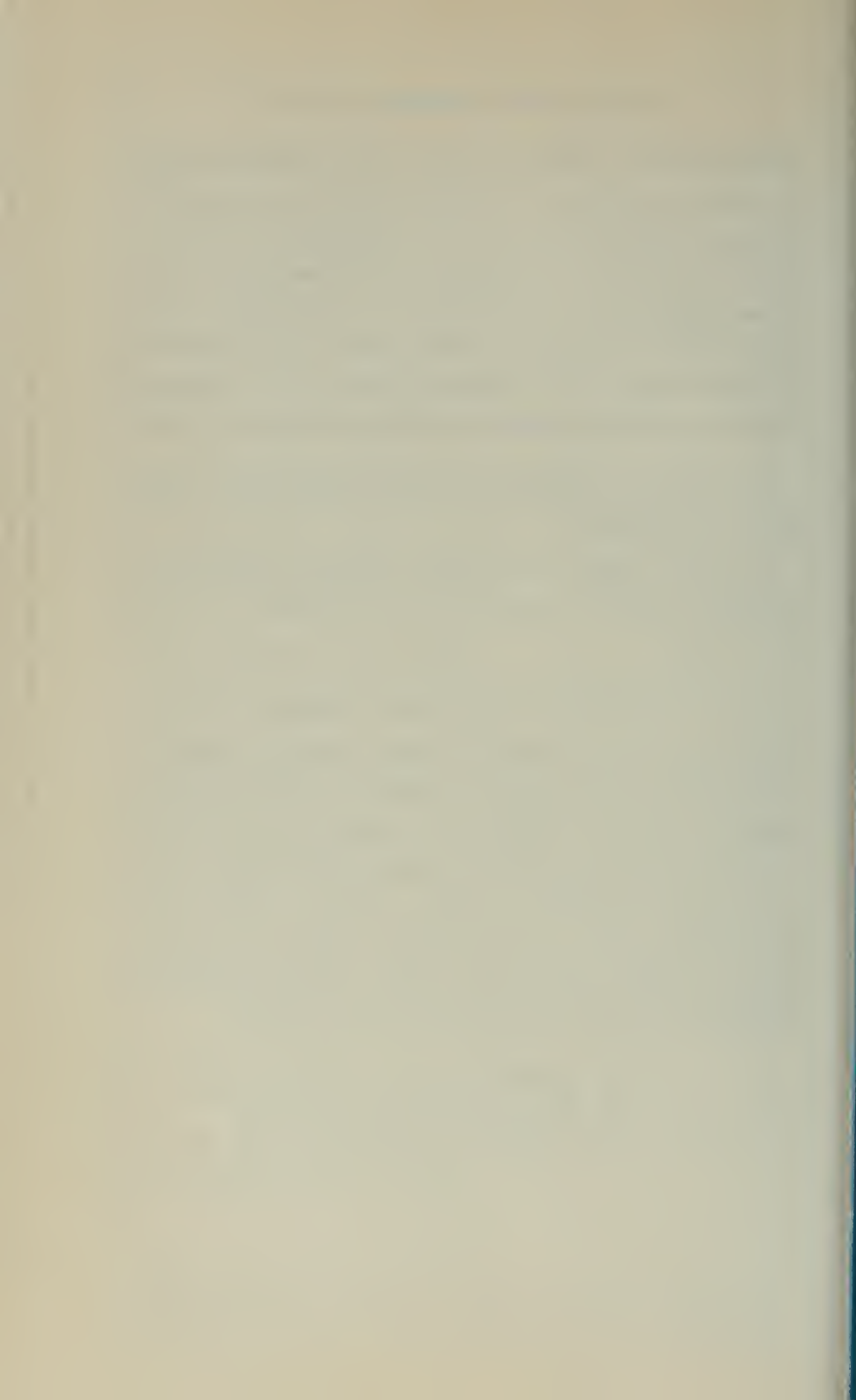
2. That plaintiff is under no duty or obligation to defend defendant Arthur Allen McKinzie in any action, suit or proceeding that may be instituted against him for damages arising out of an accident occurring June 8, 1957 at a point on U. S. Highway No. 20 about 6.5 miles East of Toledo, Oregon.

3. That plaintiff is under no duty and is not obligated to pay any judgment that may be rendered against defendant Arthur Allen McKinzie arising out of the aforementioned accident.

/s/ ARTHUR S. VOSBURG,

/s/ FRANK McK. BOSCH,

Attorneys for Plaintiff.



MAILED 4-17-57
TYPE STATE DIVY ABBRY TERM
1 2 1 1 1

Policy Number 174380
DPC AC

NAME OF APPLICANT

ARTHUR A. McKINZIE

ADDRESS

4619 S.W. NEW FERR POINT

SEASIDE, OREGON

OCCUPATION

Welder

Except with respect to bailment lease, conditional sale, mortgage or other encumbrance, the applicant is the sole owner of the automobile except as herein stated

POLICY PERIOD

4-16-57 TO 10-16-57

AT 12:01 A.M. STANDARD TIME, AT THE ADDRESS OF THE APPLICANT STATED HEREIN.

LIMITS OF LIABILITY		PREMIUM DEPOSIT	INITIAL FEE	BILLING CODES	DESCRIPTION OF VEHICLE
A-Bodily Injury	\$10,000 each person \$20,000 each accident	30 ⁰⁰	1 ⁰⁰		Year 1951 Cyls 8
B-Property Damage	\$5,000 each accident				Make Cad
C & D-Fire and Theft	Actual Cash Value				Model
E-Comprehensive Car Damage (Including Fire & Theft)	Actual Cash Value	0 ⁰⁰	.50		Body Type Cpe
F-1 Collision or Upset	Actual Cash Value Less 50 Deductible	22 ⁰⁰	.50		Motor No 516262287
F-2 Towing and road service					Serial No
G-Medical Expense	\$ each person				Purchase Date 4-16-57
Other Coverage					New or Used Used
ACCIDENTAL DEATH and DISABILITY? (Use Line Above to Indicate Coverage)	TOTAL →	5814 ²⁰⁰			Purchase Price \$1990 ⁰⁰

Any loss under Coverages C and D, E and F-1 is payable to the named insured and such persons as are named hereafter, if any, as their interest may appear

City Finance Co. 534 S.E. Main
Portland Ore

APPLICANTS STATEMENT

(Under No Circumstances will the Exchange be bound unless all questions below have been answered)

- Have you or ANY DRIVER of this car—
 - any physical impairment? No
 - had auto insurance cancelled or refused? No
 - had license revoked or suspended? No
 - received any driving charges, citations or fines (not parking) in past 3 years? No
 - been involved in any auto accident as a driver in past 3 years? No
- Name of previous insurer none
- Name and address of Employer Page & Pass Truck Equipment Co Portland
- The vehicle (s) (is) (is not) used in the duties of my present occupation.
- The following are the only other drivers of this vehicle living in the household:

NAME	AGE	RELATIONSHIP	% OF DRIVING	SINGLE OR MARRIED?
<u>none</u>				
- How long have you known Agent? new
- Did Agent inspect vehicle? yes
- Any unrepaired damage noted? No
- I am (single) (married)
- My age is 40 and birthdate
- How many cars in the household? one
- If vehicle not garaged at above address, state where
- How long living at present address? 2 years
If less than a year, previous addresses:

In consideration of the benefits to be derived therefrom the subscriber agrees with Mayflower Insurance Exchange and other subscribers thereto through Mayflower Underwriters, Inc. their attorney in fact, to exchange with all other subscribers, policies of insurance or reinsurance in such form as may be specified by said attorney in fact and approved by the Board of Governors or its Executive Committee for any loss insured against, and subscribe appoints Mayflower Underwriters, Inc. to be attorney-in-fact for subscriber with full power of substitution, granting it power in subscriber's name, place and stead to do all things which subscriber might or could do, severally or jointly, with reference to all policies issued, in the management of the Exchange and the receipt of monies due to the Exchange, disbursement of loss and expense payments to effect reinsurance, and perform all other acts incidental to the business of the Exchange and the business of later insurance; the maximum amount to be paid to Mayflower Underwriters, Inc. as compensation for its services shall be the amount of the premium received less and twenty-five per cent of all premiums. Said attorney is empowered to accept service of process on behalf of the Exchange and to authorize insurance commissioner of the State of Oregon to issue orders for the Exchange upon contracts of inter-insurance. However and general surplus remaining after payment of losses and expenses out of the fund of members and Governors reserves, agents' commissions, and such other specified fees, dues and expenses as may be authorized by the Board of Governors. All other expenses incurred in the conduct of the business and such of the above expenses as may be agreed upon between Mayflower Underwriters, Inc. and the Board of Governors or its Executive Committee shall be borne by Mayflower Underwriters, Inc. The subscriber agrees to be liable severally for a contingent liability which shall not be more than a sum equal to one premium deposit, which contingent assessment liability shall apply only to actual losses and expenses incurred during the time that the policy of insurance shall have been in force.

This agreement can be agreed upon any number of counterparts with the same effect as though the signatures of all subscribers were upon the same instrument, and shall be binding upon the parties severally and ratable as provided in the policies issued. The word "subscriber" as used herein shall mean members of the Exchange, the subscriber hereto, and all other subscribers to this or any other like agreement.

I declare the facts within the applicants statement to be true and request the Exchange to issue the insurance in reliance thereon. I understand the insurance will in no event become effective prior to the time and date actually applied for, as indicated below.

Applied for 6 days (TIME) 4-16 (MONTH) 1957 (DAY) 1957 (YEAR) A. A. McKinzie (SIGNATURE OF APPLICANT)

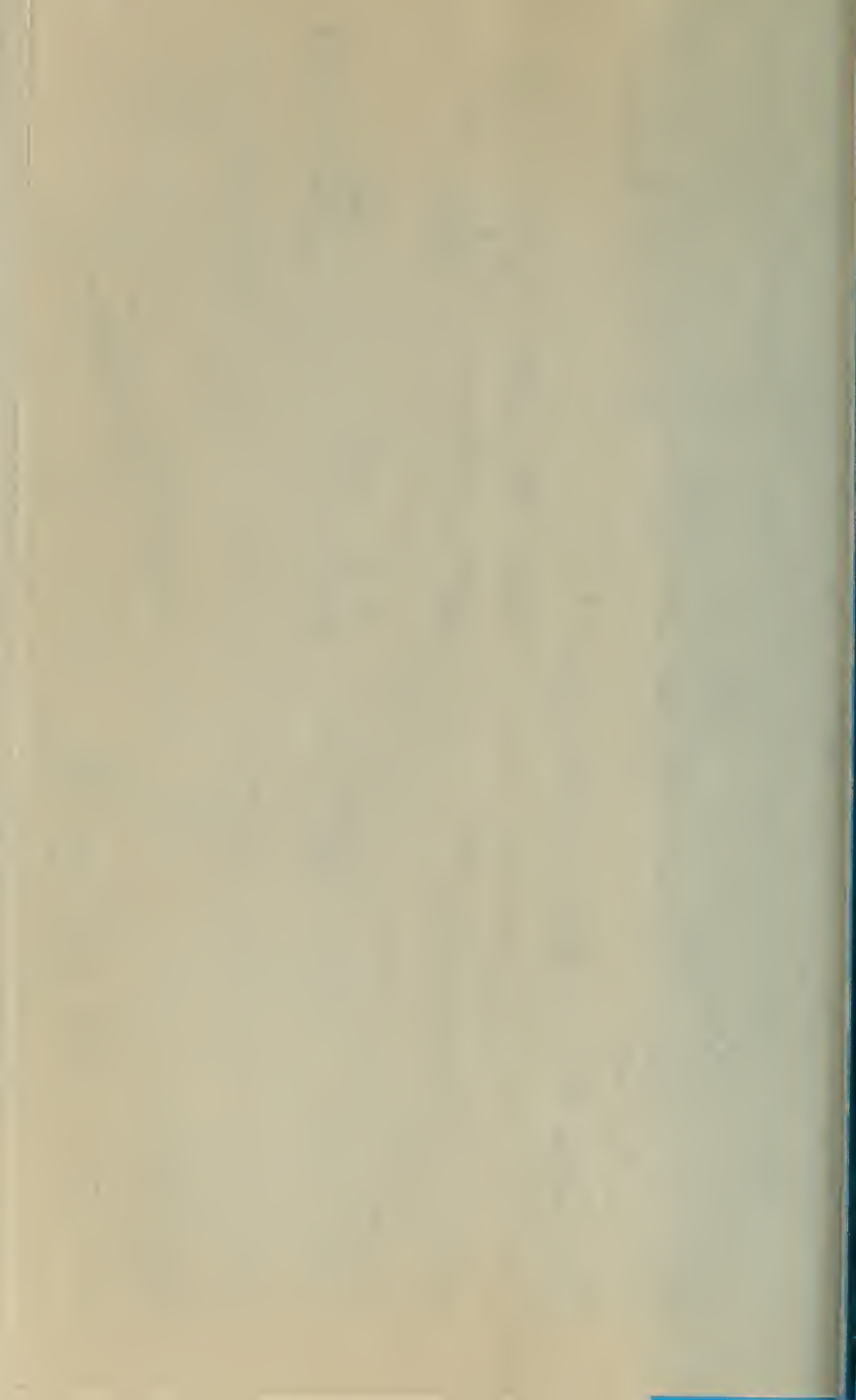


EXHIBIT "B"

Mayflower Insurance Exchange

3717 Third Avenue • Seattle, 1, Washington

NAMED INSURED

DECLARATIONS

POLICY NUMBER

ARTHUR A MC KENZIE
4619 SW
VIEW POINT TERR
PORTLAND ORE

174380

Policy period shown below to be effective 12:01 A.M. Standard Time, but in no event prior to the date and hour actually applied for; at the address of the named insured as stated herein and additional terms of six calendar months each for which the required premium is paid.

The insurance afforded is only with respect to such, and so many of the following coverages as are indicated by specific Premium Deposit charge or charges. The limit of the Exchange's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

POLICY PERIOD		ACCT CODE	TYPE	ST.	DIST.	LOCAL AGENT	TERR.	C. C.	D. P. C.
FROM	TO								
4 1637	10 1657			11	2 01		1	102	40575109

BI - PD PER LIMITS STATED BELOW	PIRE & THEFT ACTUAL CASH VALUE	COMPREHENSIVE PIRE & THEFT ACTUAL CASH VALUE	COLLISION PER CODE BELOW ACTUAL CASH VALUE	TOWING & R EXTENDED COVERAGE	OTHER PER ENDORSEMENTS	MEDICAL PER LIMITS STATED BELOW	FILING FEE	INITIAL MEMBERSHIP FEE	TOTAL PREMIUM INCLUDING MEMBERSHIP FEE
3024		540	2250					200	6014

COVERAGES AND LIMITS OF LIABILITY

BODILY INJURY	PROPERTY DAMAGE	COLLISION TYPE	PER CODE BELOW	MEDICAL PAYMENTS
\$ 10,000 each person	\$ 5,000 each occurrence	2		each person \$

COLLISION CODES:

(1) \$25 DEDUCTIBLE (2) \$50 DEDUCTIBLE (3) \$100 DEDUCTIBLE (4) \$250 DEDUCTIBLE (5) \$500 DEDUCTIBLE (6) \$1000 DEDUCTIBLE (7) 20/80 % - \$50 MAXIMUM

AUTOMOBILE DESCRIPTION YEAR TRADE NAME	BODY TYPE
51 CAD	CPE
MOTOR OR SERIAL NO.	NAMED INSURED IS INDIVIDUAL, CORPORATION OR PARTNERSHIP
516262287	IND

The automobile described is unencumbered except as herein stated: Any loss under Coverages C, D, E and F-1 is payable as interest may appear to the named insured and

CITY FINANCE CO
534 SE MORISON
PORTLAND ORE

Except with respect to bailment lease, conditional sale, mortgage or other encumbrance, the named insured is the sole owner of the automobile except as herein stated.

APR 24 1957

COUNTERSIGNED _____

EXHIBIT B

MAYFLOWER INSURANCE EXCHANGE. (an insurance exchange, herein called the Exchange), agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the membership fee and the premium deposit and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

COVERAGE A—Bodily Injury Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, or death, at any time resulting therefrom, sustained by any person, caused by accidental occurrence and arising out of the ownership, maintenance or use of the automobile.

COVERAGE B—Property Damage Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, caused by accidental occurrence and arising out of the ownership, maintenance or use of the automobile.



COVERAGE C—Fire, Lightning and Transportation. To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused (a) by fire or lightning, (b) by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is located, or (c) by the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported on land or on water, including general average and salvage charges for which the insured is legally liable.

COVERAGE D—Theft. To pay for loss of or damage to the automobile, hereinafter called loss, caused by theft, larceny, robbery or pilferage.

COVERAGE E—Comprehensive. To pay for any direct and accidental loss of, or damage to the automobile hereinafter called loss, except loss caused by collision of the automobile with another object or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached. Loss, including breakage of glass, caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset.

COVERAGE F-1—Collision or Upset. To pay for any direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile, but only for the amount of each such loss in excess of the deductible amount, if any, stated in the declarations as applicable hereto.

COVERAGE F-2—Towing-Road Service. To pay for towing and labor costs necessitated by the disablement of the automobile, provided the labor is performed at the place of disablement and provided such disablement occurs on the road outside the limits of the insured's premises.

COVERAGE G—Medical Payments. To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, caused by accident, while in, entering or alighting from the automobile if the automobile is being used by the named insured or with his permission.

The above Medical Coverage is extended to include the named insured and spouse and members of his immediate family, who are residents of his household at the time of the accident, while riding in any automobile not owned, leased or hired by the named insured, or if any of the same while pedestrians or bicyclists are struck by any motor vehicle.



II. DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS. As respects the insurance afforded by the other terms of this policy under coverages A and B the Exchange shall:

- defend any suit against the insured alleging such injury, sickness, disease or destruction and seeing damages on account thereof, even if such suit is groundless, false or fraudulent; but the Exchange may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;
- pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail required of the insured in the event of accident or traffic law violation only with respect to Coverage A, during the policy period, not to exceed the usual charges of surety companies, and in no event to exceed \$100 per bail bond, but without any obligation to apply for or furnish any such bonds;
- pay all expenses incurred by the Exchange, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the Exchange has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the Exchange's liability thereon;



- pay expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident.

(e) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the Exchange's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the Exchange in addition to the applicable limit of liability of this policy.

III. DEFINITION OF 'INSURED.' With respect to coverages A and B, the unqualified word "insured" includes the named insured and, except where specifically stated to the contrary, also includes any person while using the automobile and any person or organization legally responsible for the use thereof, when used with the permission of the named insured. The insurance, with respect to coverages A and B, does not apply to injury to or death of any person who is a named insured. The insurance with respect to any person or organization other than the named insured does not apply:

- to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;
- to any employee with respect to injury to or death of another employee of the same employer injured in the course of such employment if arising out of the maintenance or use of the automobile in the business of such employer.

IV. AUTOMOBILES DEFINED, TRAILERS, TWO OR MORE AUTOMOBILES, INCLUDING AUTOMATIC INSURANCE.

(a) Automobile. Except where stated to the contrary, the word "automobile" means:

- Described Automobile** — the motor vehicle or trailer described in this policy;
- Utility Trailer** — under coverages A, B and G, a trailer not so described, if designed for use with a private passenger automobile if not being used with another type automobile, light farm trucks excepted, and if not an office, store, display or passenger trailer.



(3) **Temporary Substitute Automobile** — under coverages A, B and G, an automobile not owned by the named insured, while temporarily used as the substitute for the described automobile while withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction. This insuring agreement does not cover as an insured the owner of the substitute automobile or any employee of such owner.

(4) **Newly Acquired Automobile** — an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the Exchange within thirty days following the date of its delivery to him, and if it replaces an automobile described in this policy; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile. The word "automobile" also includes under coverages C, D, E and F its equipment and other equipment permanently attached thereto.

- Semi-trailer** — The word "trailer" includes semi-trailer.
- Two or More Automobiles** — When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability under coverages A and B and separate automobiles as respects limits of liability, including any deductible provisions, under coverages C, D, E and F.

V. USE OF OTHER AUTOMOBILES. If the named insured is an individual who owns the private passenger automobile described or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to said automobile, applies with respect to any other automobile, subject to the following provisions:

- With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "insured" includes (1) such named insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such named insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.
- This insuring agreement does not apply:
 - to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;
 - to any automobile while used in the business or occupation of the named insured or spouse except a private passenger automobile operated or occupied by such named insured, spouse, chauffeur or servant;
 - to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place;
 - under coverage G, unless the injury results from the operation of such other automobile by such named insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such named insured or spouse.

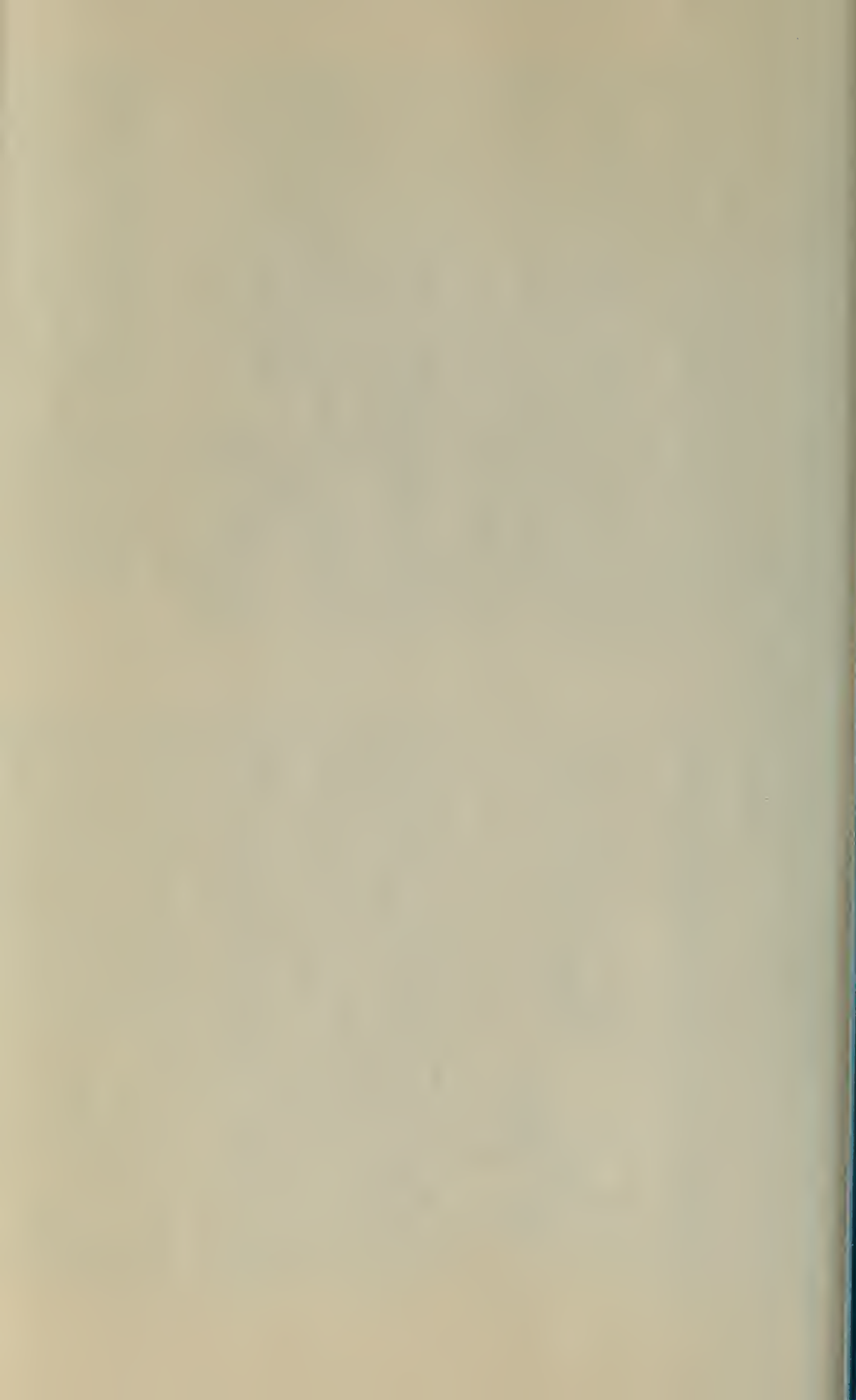


Exhibit "B" -- (Continued)

VI. LOSS OF USE BY THEFT — RENTAL REIMBURSEMENT. The Exchange following a theft covered under this policy, shall reimburse the named insured for expense not exceeding \$5 for any one day nor totaling more than \$150 or the actual cash value of the automobile at time of theft, whichever is less, incurred for the rental of a substitute automobile, including taxes.



Reimbursement is limited to such expense incurred during the period commencing seventy-two hours after such theft, and has been reported to the Exchange and the police and terminating, regardless of expiration of the policy period, on the date the whereabouts of the auto-

motive becomes known to the named insured or the Exchange or on such earlier date as the Exchange makes or tenders settlement for such theft.

Such reimbursement shall be made only if the stolen automobile was a private passenger automobile not used as a public or livery conveyance and not owned and held for sale by an automobile dealer.

VII. POLICY PERIOD, TERRITORY, PURPOSES OF USE. This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United States of America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

EXCLUSIONS

This policy does not cover:

(a) under any of the coverages, while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor;

(b) under coverages A, B and G, to liability assumed by the insured under any contract or agreement;

(c) under coverages A and B, while the automobile is used for towing of any trailer not covered by like insurance in the Exchange or while any trailer covered by this policy is used with any automobile not covered by like insurance in the Exchange;

(d) under coverages A and G, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment, other than domestic, of the insured or while engaged in the operation, maintenance or repair of the automobile, or while engaged in domestic employment if benefits therefor are either payable or required to be provided under any workman's compensation law.

(e) under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workman's compensation law;

(f) under coverage B, to injury to or destruction of property owned by, rented to, in charge of or transported by the insured.

(g) under coverage G, to bodily injury to or sickness, disease or death of any person, if benefits therefor are either payable or required to be provided under any workman's compensation law.

(h) under coverages C, D, E and F, while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy; to loss due to riot or civil commotion or war, whether or not declared, invasion, civil war, insurrection, rebellion or revolution or to confiscation by duly constituted governmental or civil authority;

to any damage to the automobile which is due to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage is the result of other loss covered by this policy;

to robes, wearing apparel or personal effects; to tires, unless damaged by fire or stolen or unless such loss be coincident with other loss covered by this policy;

(i) under coverages D and E, to loss due to conversion; embezzlement or secretion by any person in lawful possession of the automobile.

(j) under coverage F, to breakage of glass if insurance with respect to such breakage is otherwise afforded.

CONDITIONS

The conditions, except conditions 1 to 17 inclusive, apply to all coverages. Conditions 1 to 17 inclusive apply only to the coverage or coverages noted thereunder.

1. Notice of Accident—Coverages A, B and G. When an accident occurs, written notice shall be given by or on behalf of the insured to the Exchange or any of its authorized agents as soon as practicable, but in any event within 60 days from date of accident. Such notice shall contain particulars sufficient to identify the insured, and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

2. Notice of Claim or Suit—Coverages A and B. If claim is made or suit is brought against the insured, the insured shall immediately forward to the Exchange every demand, notice, summons or other process received by him or his representative.

3. Limits of Liability—Coverages A, B and G. The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the Exchange's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident. The limit of such liability stated in the declarations as applicable to "each accident" is subject to the above provision respecting each person, the total limit of the Exchange's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the Exchange's liability for all expenses, incurred by or on behalf of each person who sustains bodily injury, sickness or disease, including death resulting therefrom, in any one accident.

The inclusion herein of more than one insured shall not operate to increase the limits of the Exchange's liability.

4. Action Against Exchange—Coverages A and B. No action shall lie against the Exchange unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Exchange.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the Exchange as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Exchange of any of its obligations hereunder.

5. Action Against Exchange—Coverage G. No action shall lie against the Exchange unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, or until thirty days after the required proofs of claim have been filed with the Exchange.

6. Financial Responsibility Laws—Coverages A and B. Such insurance as is afforded by this policy for bodily injury liability or property damage liability

shall comply with the provisions of the motor vehicle financial responsibility law of any State or Province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the Exchange for any payment made by the Exchange which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

7. Assault and Battery—Coverages A and B. Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

8. Medical & Other Reports; Examination—Coverage G. As soon as practicable the injured person or someone on his behalf shall give to the Exchange written proof of claim, under oath if required, and shall after each request from the Exchange, execute authorization to enable the Exchange to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the Exchange when and as often as the Exchange may reasonably require.

9. Proof and Payment of Claim—Coverage G. The Exchange may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute admission of liability of the insured, or except hereunder, of the Exchange.

10. Named Insured's Duties When Loss Occurs—Coverages C, D, E and F. When loss occurs, the named insured shall:

(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the named insured's failure to protect shall not be recoverable under this policy; reasonable expense incurred in affording such protection shall be deemed incurred at the Exchange's request;

(b) give notice thereof as soon as practicable to the Exchange or any of its authorized agents and also in the event of theft, larceny, robbery or pilferage to the police but shall not, except at his own cost, offer or pay any reward for recovery of the automobile;

(c) file proof of loss with the Exchange within sixty days after the occurrence of loss, unless such time is extended in writing by the Exchange, in the form of a sworn statement of the named insured setting forth the interest of the named insured and of all others in the property affected by the encumbrance thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, the amount of rental or other expense for which reimbursement is provided under this policy, together with original receipts therefor, and the description and amounts of all other insurance covering such property.



upon the Exchange's request, the named insured shall exhibit the damaged property to the Exchange and submit to examinations under oath by anyone designated by the Exchange, subscribe the same and produce for the Exchange's examination all pertinent records and sales invoices, or certified copies, if originals be lost, permitting copies thereof to be made, all of such reasonable times and places as the Exchange shall designate.

11. APPRAISAL—Coverages C, D, E and F. If the named insured and the Exchange fail to agree as to the amount of loss, each shall, on the written demand of either, make within sixty days after receipt of proof of loss by the Exchange, select a competent and disinterested appraiser, and the appraisal shall be made at a mutually agreed time and place. The appraiser shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request of the named insured or the Exchange, such umpire shall be selected by a judge of a Court of Record in the County and State in which such appraisal is pending. The appraiser shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The named insured and the Exchange shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The Exchange shall not be held to have waived any of its rights by any act relating to appraisal.

12. Coverage While in Mexico. Coverage under Insuring Agreements A, B, F1, F2, G, and coverages C, D, and E, excluding THEFT OR RENTAL REIMBURSEMENT THEREFOR, apply while the automobile insured is being used for occasional trips for a period not exceeding ten days at any one time, in that part of the Republic of Mexico lying not more than 25 miles from the boundary line of the United States of America.

If it is agreed that any claim payable under coverages C, D, E, and F1, arising or resulting from any loss or damage occurring in such Mexican territory, shall be payable in the United States of America, and that in the event of loss or damage which may make necessary the repair of the automobile or replacement of any part or parts thereof, while said automobile is in such Mexican territory, the basis of adjustment of claim for such repairs and/or replacement shall not exceed the cost of such repairs and/or replacement at the nearest point in the United States where such repairs and/or replacement can be made, and it is further expressly understood and agreed that the cost of towing and/or transportation, and/or salvage operations of the insured automobile while within Mexican territory, shall not be recoverable hereunder and is not a contingency insured against.

If it is agreed that the coverage provided herein shall be void unless the insured's place of residence is within the United States of America, and the automobile covered by this policy is principally garaged, maintained and used within the United States of America.

13. Limit of Liability; Settlement Options; No Abandonment—Coverages C, D, E and F. The limit of the Exchange's liability for loss shall not exceed the actual cash value of the automobile, or if the loss is of a part thereof the actual cash value of such part, at time of loss or what it would then cost to repair or replace the automobile or such part thereof with other of like kind and quality, with deduction for depreciation, or the applicable limit of liability stated in the declarations.

The Exchange may pay for the loss in money or may repair or replace the automobile or such part thereof, as aforesaid, or may return any stolen property with payment for any resultant damage thereto at any time before the loss is paid or the property is so replaced, or may take all or such part of the automobile at the agreed or appraised value but there shall be no abandonment to the Exchange.

14. Payment for Loss: Action Against Exchange—Coverages C, D, E and F. No action shall lie against the Exchange unless, as a condition precedent thereto, the named insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

15. No Benefit to Bailee—Coverages C, D, E and F. The insurance afforded by this policy shall not ensure directly or indirectly to the benefit of any carrier or bailee liable for loss to the automobile.

16. Assistance & Cooperation of the Insured—Coverages A, B, C, D, E, F, and G. The insured shall cooperate with the Exchange and, upon the Exchange's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

17. Subrogation—Coverages A, B, C, D, E and F. In event of any payment under this policy, the Exchange shall be subrogated to all the insured's or insured's passengers' rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

18. Other Insurance—Coverages A, B, C, D, E and F. If the insured has other insurance against a loss covered by this policy the Exchange shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss, provided, however, the insurance under Insuring Agreements IV and V shall be excess insurance over any other valid and collectible insurance available.

IN WITNESS WHEREOF, the Exchange executed these presents; but this policy shall not be valid unless countersigned on the Declarations page by a duly authorized representative of the Exchange.

able to the insured, either as an insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under either or both of said insuring agreements.

19. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Exchange from asserting any right under the terms of this policy, nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed for MAYFLOWER INSURANCE EXCHANGE by an executive officer of its attorney-in-fact, the MAYFLOWER UNDERWRITERS, INC.

20. Assignment. Assignment of interest under this policy shall not bind the Exchange until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy shall not be affected. If, within notice by such written notice within sixty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) under coverages A and B, subject otherwise to the provisions of Insuring Agreement III, any person having proper temporary custody of the automobile, as an insured, and under coverage G while the automobile is used by such person, until the appointment and qualification of such legal representative but in no event for a period of more than sixty days after the date of such death or adjudication.

21. Cancellation. This policy may be canceled by the named insured by mailing to the Exchange written notice stating when thereafter such cancellation shall be effective. This policy may be canceled by the Exchange by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the effective date and hour. Delivery of such written notice either by the named insured or by the Exchange shall be equivalent to mailing.

If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the Exchange cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The Exchange's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

22. Declarations. By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Exchange or any of its agents relating to this insurance.

Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued, are hereby amended to conform to such statutes.

23. Reciprocal Provisions. This policy is made and accepted in consideration of (1) the partnership membership in this policy, (2) the declarations made in the application for the Policy, and (3) the execution of a power of attorney to MAYFLOWER UNDERWRITERS, INC., herein called the "Corporation," authorizing it to execute insurance policies between the terms of this policy, herein called the "named insured," and other subscribers to the MAYFLOWER INSURANCE EXCHANGE.

No term or condition of the policy is intended to create, create, or to give rise to or create any joint liability.

To enforce any claims arising under this policy the Exchange shall be sued or sue in its own name as in the case of an individual. Service of process in any such suit against the Exchange shall be upon the MAYFLOWER UNDERWRITERS, INC., Attorney-in-fact.

Membership Fees paid upon commencement of coverage on this policy, which are in addition to the premium, are not returnable but may be applied as a credit to Membership Fees required of the named insured for insurance accepted by the Exchange.

The entire policy shall automatically and immediately become canceled and void upon the expiration of any current term, if any current term, the named insured defaults in making payment of amounts required to maintain the premium deposit.

The annual meeting of the members of the Exchange shall be held at the Home Office of the Exchange at Seattle 1, Wash., on the first Monday following the 14th day of March, each year, at the hour of 10 A. M., unless the Board of Governors shall elect to change the time and place of such meeting, in which case, but not otherwise, written or printed notice shall be mailed each member at his last known address at least ten days prior thereto. The Board of Governors shall be chosen by the subscribers from among themselves, at the annual meeting, or any special meeting held for that purpose and shall have full power and authority to establish rules and regulations for the management of the Exchange not inconsistent with subscriber's agreements.

The Premium Deposit for this policy and all payments made for its continuance shall be payable to the Exchange at the Home Office of the Exchange. The funds so deposited shall be placed to the credit of the named insured upon the records of the Exchange and applied to the payment of insured's proportion of losses and expenses and to the establishment of reserves and general surplus. All such funds may be deposited and withdrawn or invested as the Board of Governors or its Executive Committee designates. The insured agrees that any amount contributed to a general surplus fund out of his premium deposit may be retained by the Exchange and applied to any purpose deemed proper and advantageous to policy holders.

The insured's aggregate contingent liability under this policy shall not be more than one additional premium deposit.

MAYFLOWER INSURANCE EXCHANGE,
By Mayflower Underwriters, Inc., Attorney-in-fact.

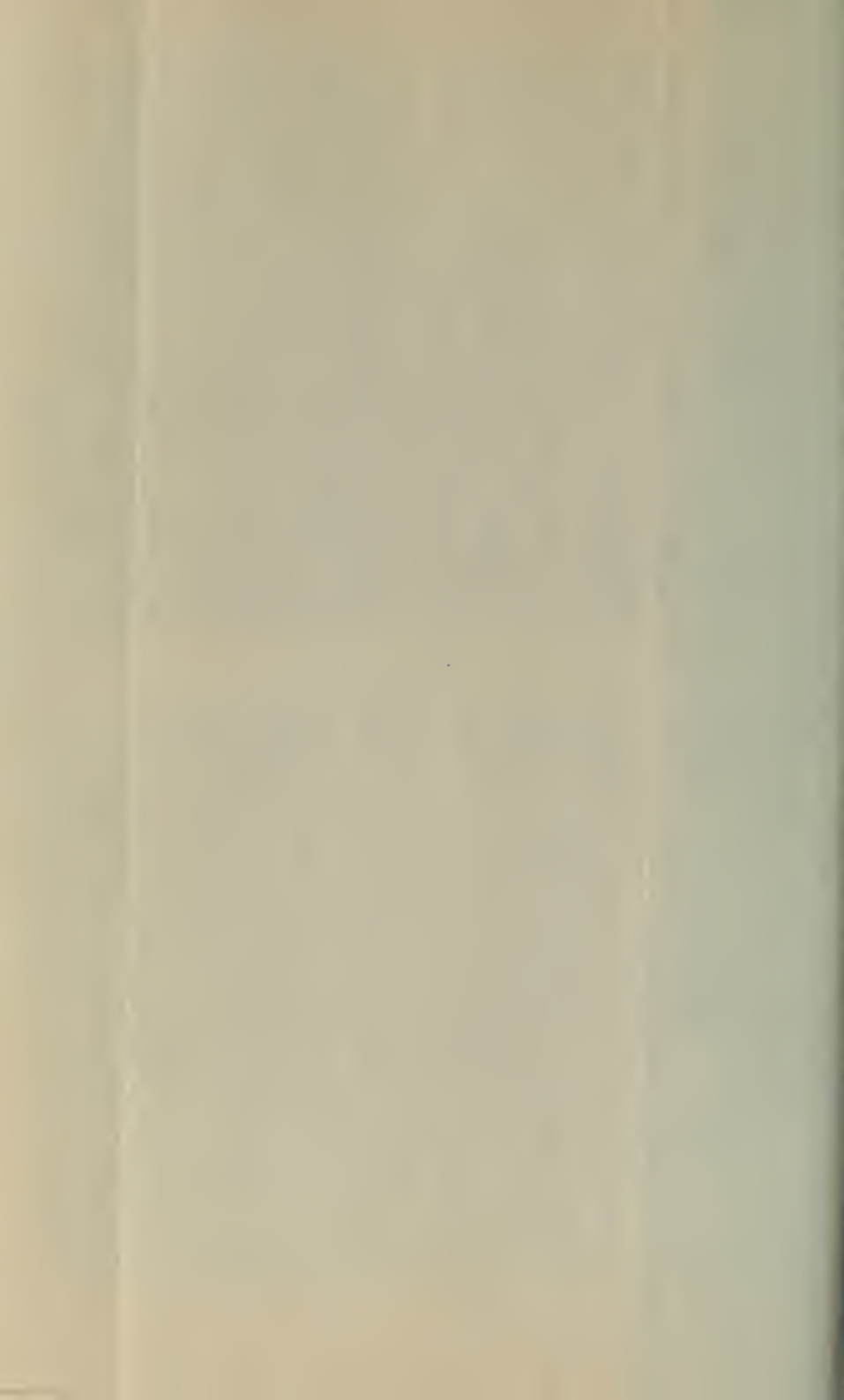
[Handwritten Signature]

Secretary.

[Handwritten Signature]

President.

Endorsed: Filed October 1, 1957



AUTOMOBILE LOSS PAYABLE ENDORSEMENT

With respect to the interest of the Lien Holder named on face of Policy Declaration.

its successors and assigns, (hereinafter called the Lien-Holder) in its capacity as conditional Vendor or Mortgagee or otherwise, in the property insured under this policy, this Company hereby agrees as follows:

1. Loss or damage, if any, to the property described in this policy shall be payable firstly to the Lien-Holder and secondly to the insured, as their interests may appear, provided nevertheless that upon demand by the Lien-Holder upon the Company for separate settlement the amount of said loss shall be paid directly to the Lien-Holder to the extent of its interest and the balance, if any, shall be payable to the insured.
2. The insurance under this policy as to the interest only of the Lien-Holder shall not be impaired in any way, by any change in the title or ownership of the property or by any breach of warranty or condition of the policy, or by any omission or neglect, or by the performance of any act in violation of any terms or conditions of the policy or because of the failure to perform any act required by the terms or conditions of the policy or because of the subjection of the property to any conditions, use or operation not permitted by the policy or because of any false statement concerning this policy or the subject thereof, by the insured or the insured's employees, agents or representatives; whether occurring before or after the attachment of this agreement, or whether before or after the loss; PROVIDED, however, that the wrongful conversion, embezzlement or secretion by the Purchaser, Mortgagee, or Lessee in possession of the insured property under mortgage, conditional sale contract, lease agreement, or other contract is not covered under this policy, unless specifically insured against and premium paid therefor.
3. In the event of failure of the insured to pay any premium or additional premium which shall be or become due under the terms of this policy, this Company agrees to give written notice to the Lien-Holder of such non-payment of premium after thirty (30) days from and within one hundred and twenty (120) days after due date of such premium and it is a condition of the continuance of the rights of the Lien-Holder hereunder that the Lien-Holder when so notified in writing by this Company of the failure of the insured to pay such premium shall pay or cause to be paid the premium due within ten (10) days following receipt of the Company's demand in writing therefor. If the Lien-Holder shall decline to pay said premium or additional premium, the rights of the Lien-Holder under this Automobile Loss Payable Endorsement shall not be terminated before ten (10) days after receipt of said written notice by the Lien-Holder.
4. If the Company elects to cancel this policy in whole or in part for non-payment of premium, or for any other reason, the Company will forward a copy of the cancellation notice to the Lien-Holder at its office specified hereinafter concurrently with the sending of notice to the insured but in such case this policy shall continue in force for the benefit of the Lien-Holder only for ten (10) days after written notice of such cancellation is received by the Lien-Holder. In no event, as to the interest only of the Lien-Holder, shall cancellation of any insurance under this policy covering the property described in the policy be effected at the request of the insured before ten (10) days after written notice of request for cancellation shall have been given to the Lien-Holder by the Company. In the event of cancellation of this policy the unearned premium shall be paid to the Lien-Holder, provided the said Lien-Holder has advanced the premium.
5. If there be any other insurance upon the within-described property, this Company shall be liable under this policy as to the Lien-Holder only for the proportion of such loss or damage that the sum hereby insured bears to the whole amount of valid and collectible insurance of similar character on said property under policies held by, payable to and expressly consented to by the Lien-Holder, and to the extent of payment so made this Company shall be subrogated (pro rata with all other insurers contributing to said payment) to all of the Lien-Holder's rights of contribution under said other insurance.
6. Whenever this Company shall pay to the Lien-Holder any sum for loss or damage under this policy and shall claim that as to the insured no liability therefor exists, this Company at its option, may pay to the Lien-Holder the whole principal sum and interest due or to become due from the insured on the obligation secured by the property insured under this policy, (with refund of all interest not accrued), and this Company shall thereupon receive a full assignment and transfer, without recourse, of said obligation and the security held as collateral thereto; but no subrogation shall impair the right of the Lien-Holder to recover the full amount of its claim.
7. The coverage granted under this policy shall continue in full force and effect as to the interest of the Lien-Holder only, for a period of ten (10) days after expiration of said policy unless an acceptable policy in renewal thereof with loss thereunder payable to the Lien-Holder in accordance with the terms of this Automobile Loss Payable Endorsement shall have been issued by some insurance company and accepted by the Lien-Holder. In the event of a loss not otherwise covered during the extended ten (10) day period herein referred to, an annual policy covering the same hazards to the property insured under the original policy shall be issued and accepted by the Lien-Holder and Mortgagee.
8. Should the ownership and right of possession of any of the property covered under this policy become vested in the Lien-Holder or its agent, this policy shall continue for the term thereof for the benefit of the Lien-Holder (with all incidents of ownership of the policy) but, in such event, Paragraphs two (2), five (5) and six (6) of this Automobile Loss Payable Endorsement shall no longer apply; provided, nevertheless, all privileges and endorsements which, by reason of the printed conditions of this policy, are or may be necessary to maintain the validity of the contract are hereby granted for a period of thirty (30) days and all notices likewise required to be given to the Company by the insured are hereby waived for a period of thirty (30) days with the exception of requirements applying at the time of or subsequent to a loss.
9. All notices herein provided to be given by the Company to the Lien-Holder in connection with this policy and this Automobile Loss Payable

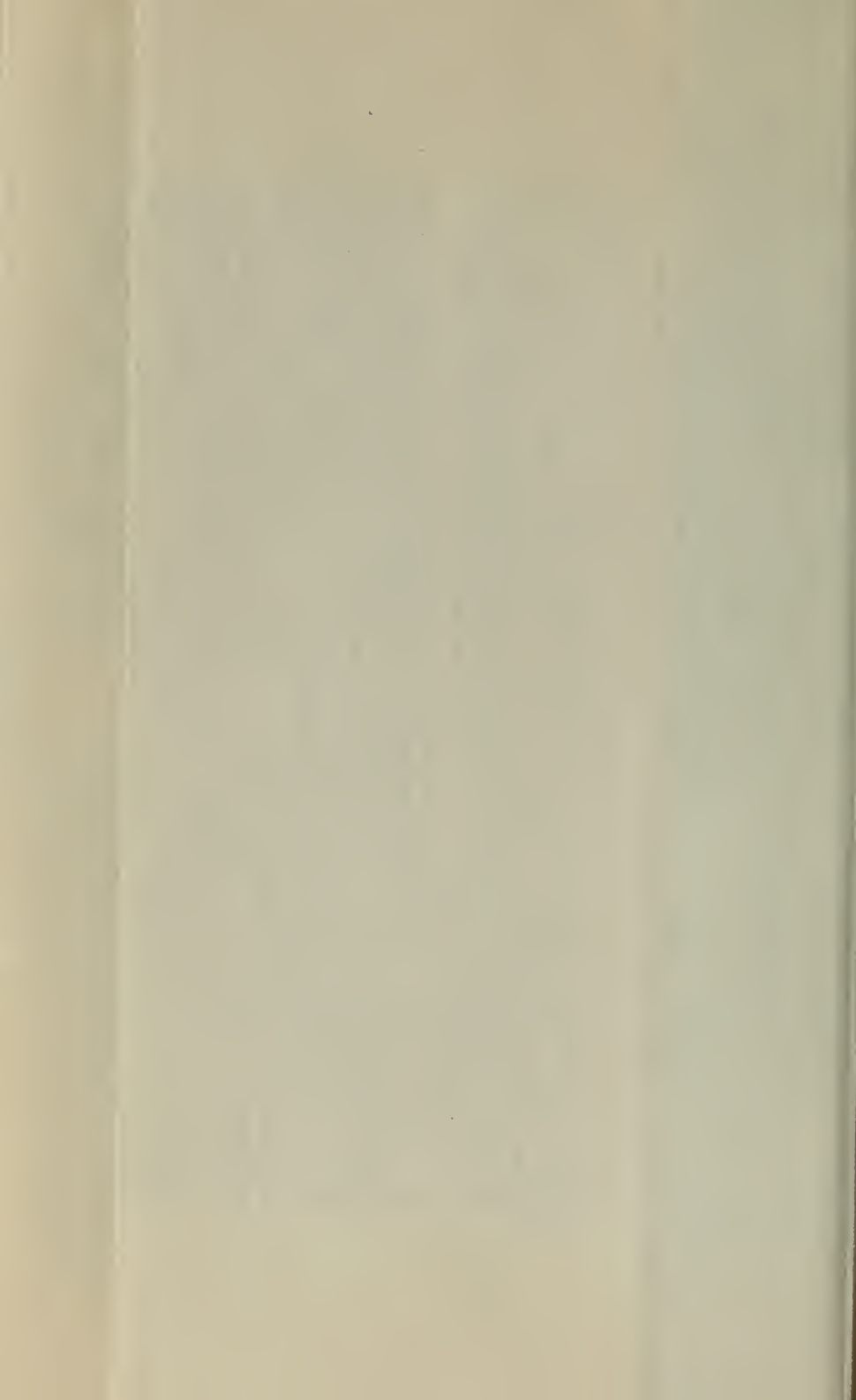
Endorsement shall be mailed to or delivered to the Lien-Holder at its office or branch shown on Declaration.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, agreements or limitations of the policy to which this Endorsement is attached, other than as stated above.

THIS IS A CONTINUOUS TYPE POLICY. Please return to assured when mortgage is paid. YOUR INTEREST will be protected until mortgage is satisfied unless policy is previously cancelled, in which case you will receive 10 days advance notice.

Mayflower Insurance Exchange
Mayflower Corporation, Attorney-in-Fact
Seattle 1, Washington

B. J. Rowland
President



[Title of District Court and Cause.]

SUMMONS

To the above named Defendants:

You are hereby summoned and required to appear and defend this action and to serve upon Arthur S. Vosburg and Frank McK. Bosch, plaintiff's attorneys, whose address is 909 American Bank Building, Portland 5, Oregon, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: October 1, 1957.

[Seal] R. DeMOTT,
 Clerk,
 /s/ M. CASEY,
 Deputy Clerk.

Return on Service Attached.

[Endorsed]: Filed October 4, 1957.

[Title of District Court and Cause.]

ANSWER

Come now the defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont, and for their answer to the plaintiff's complaint for declaratory judgment, admit, deny and allege as follows:

I.

Admits Paragraphs I and II.

II.

That the defendants have been informed and believe the truth of Paragraph III and therefore admit the same.

III.

Admit Paragraphs IV and V.

IV.

That the defendants do not have any knowledge or information thereof to form sufficient belief and therefore deny Paragraphs VI, VII and VIII.

Come now the defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont, and for their first, separate, further answer and affirmative defense, allege:

I.

That the defendants Gilmont have been informed and believe and therefore allege that the plaintiff had notice or should have known on or about June 14, 1957 that defendant Arthur Allen McKinzie had not been issued a valid driver's license from the State of Oregon and that having such knowledge the plaintiff continued to act on behalf of defendant McKinzie as his insurer and thereby waived such lack of a valid operator's license as a defense and is therefore estopped from asserting the lack of a valid operator's license as a defense.

Come now the defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont, and for their second, separate further answer and affirmative defense, allege:

I.

That the defendants Gilmont have been informed and believe and therefore allege that subsequent to the accident of June 8, 1957, which is described in plaintiff's complaint, the plaintiff recognized and admitted insurance coverage under the policy mentioned in the plaintiff's complaint by the paying to defendant McKinzie the amount of his property damage less the deductible under the collision or upset section of the policy issued to defendant McKinzie. That by such payment the plaintiff admitted that the aforementioned policy was in full force and effect and thereby waives all policy defense and is therefore estopped from asserting such defense.

Come now the defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont, and for their third separate further answer and affirmative defense, allege:

I.

That subsequent to being placed on notice of a policy defense the plaintiff continued to negotiate for a personal injury settlement with defendants' Gilmont attorneys as if such defense did not exist and at no time did plaintiff notify prior to this

suit defendants' Gilmont attorneys of such a defense. That by continued negotiation with defendants' Gilmont counsel waived such policy defense as they may have had and therefore plaintiff is estopped from asserting such defense.

Wherefore, defendants Gilmont having fully answered plaintiff's complaint for declaratory judgment pray that the same should be dismissed and that defendants Gilmont recover their costs and disbursements incurred herein.

/s/ HOLGER M. PIHL, JR.,

CRUM, WALKER & BUSS,

Attorneys for Defendants Robert Dean Gilmont,
Rose Marie Gilmont, Susan Rose Gilmont, Robert
Russell Gilmont and Norman L. Gilmont.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 18, 1957.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above entitled cause came on regularly for pretrial conference before the undersigned Judge of the above entitled court on the 21st day of April, 1958, plaintiff appearing by Frank McK. Bosch, one of its attorneys, and defendants Robert Dean Gilmont and Rose Marie Gilmont appearing by Jack L. Kennedy, one of their attorneys, and defendants Susan Rose Gilmont, Robert Russell Gil-

mont and Norman I. Gilmont appearing by Ronald A. Watson, their guardian ad litem, and by Jack L. Kennedy, one of their attorneys, and defendant Arthur Allen McKinzie appearing neither in person nor by counsel and the parties with the approval of the court agreed on the following:

Nature of the Case

This action was commenced by plaintiff Mayflower Insurance Exchange under Title 28 of the United States Code, Section 400 (28 U.S.C.A. 2201) to determine the rights and liabilities of the parties in connection with the issuance of a public liability insurance policy to defendant Arthur Allen McKinzie and in connection with a subsequent automobile accident between automobiles operated by defendant Arthur Allen McKinzie and defendant Robert Dean Gilmont which resulted in property damages and personal injuries to defendants Gilmont.

Admitted Facts

I.

Plaintiff Mayflower Insurance Exchange is an unincorporated association organized under the laws of the State of Washington as a reciprocal or inter-insurance exchange and is authorized by the laws of the State of Washington to sue and be sued in its own name, and defendant Arthur Allen McKinzie is a citizen of either the State of Oregon or the State of California and the defendants Gilmont are citizens of the State of Oregon, and the matter in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs.

II.

Defendants Robert Dean Gilmont and Rose Marie Gilmont are husband and wife, and defendants Susan Rose Gilmont, Robert Russell Gilmont and Norman I. Gilmont, are their minor children, and Ronald A. Watson, a member of the bar of this court, has been appointed Guardian ad Litem for said minor children to appear and represent them in the above entitled cause.

III.

On or about April 16, 1957, plaintiff Mayflower Insurance Exchange issued a certain policy of insurance to defendant Arthur Allen McKinzie, which insured the said Arthur Allen McKinzie against public liability for personal injuries and property damages arising out of the operation of his 1951 Cadillac coupe automobile, with limits of \$10,000.00 for injuries to any one person, \$20,000.00 for injuries arising out of any one accident, and \$5,000.00 for property damages.

IV.

On or about the 8th day of June, 1957, near Toledo, Oregon, defendant Arthur Allen McKinzie, while operating his 1951 Cadillac automobile which was insured by said insurance policy, was involved in a collision with an automobile owned and operated by defendant Robert Dean Gilmont, and said collision resulted in personal injuries to all of the defendants Gilmont and damage to the automobiles owned by defendant Arthur Allen McKinzie and defendant Robert Dean Gilmont.

V.

That defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont have retained an attorney and are demanding that defendant Arthur Allen McKinzie and plaintiff respond in damages for the injuries sustained by said defendants; that defendant Arthur Allen McKinzie is claiming that plaintiff is obligated under the terms of said policy to provide a defense for said defendant in any action that may be brought against him for damages arising out of the aforementioned accident and to pay any judgment that may be rendered against him within the limits of said policy.

Contentions of the Plaintiff

I.

That on or about April 16, 1957 at Portland, Oregon, defendant Arthur Allen McKinzie made application to the plaintiff for a policy of insurance covering defendant Arthur Allen McKinzie in the operation of a certain 1951 Cadillac coupe automobile, motor No. 516262287, Oregon license No. 4G-2710, and insuring against public liability for personal injuries arising out of the operation of said automobile with limits of \$10,000.00 for injuries to any one person and \$20,000.00 for injuries arising out of any one accident, and against property damage with limits of \$5,000.00 for each accident. That subsequent to the receipt of said application and in reliance upon the statements and

representations made therein, plaintiff issued to defendant Arthur Allen McKinzie its automobile liability insurance policy No. 174380.

II.

That certain statements and representations made by the defendant Arthur Allen McKinzie in his application for said insurance policy No. 174380 were false in that on April 16, 1957 the defendant Arthur Allen McKinzie made the following answers to the following questions put to him by said application:

- “1. Have you or Any Driver of this car
 - (a) any physical impairment? No.
 - (b) had auto insurance cancelled or refused? No.
 - (c) had license revoked or suspended? No.
 - (d) received any driving charges, citations or fines (not parking) in past 3 years? No.
 - (e) been involved in any auto accident as a driver in past 3 years? No.

2. Name of previous Insurer: None.”

whereas in truth and in fact defendant Arthur Allen McKinzie's driving privileges had been suspended by the Department of Motor Vehicles of the State of Oregon which suspension was in effect on April 16, 1957; that defendant Arthur Allen McKinzie had received various driving charges, citations or fines (not parking) in the 3 years prior to April 16, 1957; that defendant Arthur Allen McKinzie had been involved in an auto accident as a

driver within 3 years prior to April 16, 1957; and that defendant Arthur Allen McKinzie did have previous insurers who had issued to him automobile liability insurance policies prior to April 16, 1957.

III.

That plaintiff would not have issued its automobile liability insurance policy No. 174380 to defendant Arthur Allen McKinzie had it known the true state of facts and if the defendant Arthur Allen McKinzie had truthfully and correctly answered the questions put to him on said application.

IV.

That as soon as plaintiff learned of the false statements and misrepresentations made by the defendant Arthur Allen McKinzie it notified him of its decision to rescind the policy issued to him and tendered to him its check in full refund of all premiums paid thereon which refund was accepted by defendant Arthur Allen McKinzie.

V.

That no valid policy of insurance has ever been issued to defendant Arthur Allen McKinzie; that the purported policy of insurance No. 174380 was null and void and of no force and effect and plaintiff is not obligated to provide a defense for defendant Arthur Allen McKinzie in any action that may be brought against him or to pay any judgment that may be rendered against him arising out of or connected with the aforementioned accident of June 8, 1957.

VI.

Plaintiff is entitled to declaratory judgment as follows:

1. That policy No. 174380 issued by plaintiff as of April 16, 1957 was null and void as of the date of its issue;

2. That plaintiff is under no duty or obligation to defend defendant Arthur Allen McKinzie in any action, suit or proceeding that may be brought or instituted against him arising out of an accident which occurred June 8, 1957 at a point on U. S. Highway No. 20 approximately 6.5 miles east of Toledo, Oregon;

3. That plaintiff is under no duty and is not obligated to pay any judgment that may be rendered against defendant Arthur Allen McKinzie which may arise out of the aforementioned accident;

4. That defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont, Norman I. Gilmont, and each of them, be restrained from instituting any legal proceeding against plaintiff for the recovery of the amount of any judgment that said defendants, or any of them, might hereinafter obtain against defendant Arthur Allen McKinzie;

5. That plaintiff recover its costs and disbursements incurred herein.

VII.

Plaintiff denies the contentions of defendants Gilmont except as admitted in the above contentions or in the admitted facts.

Contentions of Defendants Gilmont

I.

Said automobile collision referred to in the Admitted Facts resulted in personal injuries to all of the defendants Gilmont and damage to the automobile owned by defendant Robert Dean Gilmont, and said collision and personal injuries and damages are within the terms, provisions, and coverage of the insurance policy sold and issued to defendant Arthur Allen McKinzie by plaintiff Mayflower Insurance Exchange.

II.

At all times mentioned in plaintiff's complaint and in this pretrial order, defendant Arthur Allen McKinzie was a resident of the State of California and had been issued a valid driver's license from the State of California which was in full force and effect on the date of the issuance of said public liability insurance policy and on the date of said automobile accident.

III.

Plaintiff received notice and knowledge of said accident immediately following said collision and thereafter investigated the facts and circumstances involved in said collision, and defendants Gilmont are informed and believe and therefore allege that at said time the plaintiff knew, or in the exercise of reasonable care, should have known that defendant Arthur Allen McKinzie was operating his automobile without a valid driver's license from the State of Oregon.

IV.

Prior to said automobile accident and on or about the 7th day of June, 1957, plaintiff notified defendant Arthur Allen McKinzie that his automobile insurance would be cancelled on June 14, 1957, unless a certain balance of the premium was paid before said cancellation date and thereafter and on or about the 28th day of June, 1957, plaintiff notified defendant Arthur Allen McKinzie that his automobile insurance was not in force because the premium had not been paid prior to the cancellation date.

V.

On or about the 26th day of July, 1957, plaintiff obtained proof of loss from defendant Arthur Allen McKinzie wherein the said Arthur Allen McKinzie released the plaintiff from all claims for damage to his 1951 Cadillac automobile which had resulted from said collision, and on or about July 31, 1957, plaintiff paid Arthur Allen McKinzie and City Finance Company the sum of \$956.45 in full satisfaction of said claim for property damage.

VI.

Plaintiff further failed to notify the Department of Financial Responsibility of the State of Oregon until October 29, 1957, that it was denying coverage under said insurance policy.

VII.

At all times mentioned herein the plaintiff by and through its adjusters negotiated with the attor-

neys for defendants Gilmont with respect to said personal injury claim of defendants Gilmont as if said insurance policy was in full force.

VIII.

During the month of December, 1957, defendant Robert Dean Gilmont and defendant Rose Marie Gilmont commenced an action against defendant Arthur Allen McKinzie in the Circuit Court of the State of Oregon for the personal injuries that they sustained as a result of the carelessness and negligence of the said Arthur Allen McKinzie, and on or about the 15th day of January, 1958, the plaintiff assumed the defense of the said Arthur Allen McKinzie in the Circuit Court of the State of Oregon for the County of Lincoln and appeared therein by and through its attorneys and is presently defending the said Arthur Allen McKinzie in said action for damages.

IX.

Plaintiff was careless and negligent in obtaining and completing the application for insurance from defendant Arthur Allen McKinzie.

X.

Plaintiff was careless and negligent in investigating said automobile accident and facts and circumstances concerning the driving record of defendant Arthur Allen McKinzie.

XI.

Plaintiff has waived any claimed defense under said insurance policy and it is barred and estopped from maintaining these proceedings or denying coverage under said insurance policy.

XII.

Plaintiff has been guilty of laches and has further affirmed its contract of insurance with defendant Arthur Allen McKinzie, and it is not entitled to rescind its insurance contract or the coverage under its insurance policy.

XIII.

Defendants are entitled to a declaratory judgment that insurance policy No. 174380 issued by Mayflower Insurance Exchange was in full force and effect and binding on the plaintiff on the date of the automobile accident between automobiles operated by defendant Arthur Allen McKinzie and defendant Robert Dean Gilmont; that plaintiff is under a duty and obligation to defend Arthur Allen McKinzie in any action, suit or proceedings that may be brought or instituted against him arising out of the said automobile accident; that plaintiff is under a duty and obligation to pay any judgment that may be entered against defendant Arthur Allen McKinzie to and including the amount of insurance contained in said insurance policy; and that defendants Gilmont are entitled to recover their costs and disbursements incurred herein.

XIV.

Defendants Gilmont deny the contentions of the plaintiff, except as admitted in the above contentions or in the admitted facts.

Issues

I.

Was public liability insurance policy No. 174380 issued by Mayflower Insurance Exchange to Arthur Allen McKinzie on April 16, 1957, null and void and of no force and effect as of the date of its issuance, or was it valid and binding on June 8, 1957, the date of the collision between automobiles operated by defendant Arthur Allen McKinzie and Robert Dean Gilmont?

II.

Is Mayflower Insurance Exchange under any duty or obligation to defend defendant Arthur Allen McKinzie in the action for personal injuries which has been commenced against him by defendant Robert Dean Gilmont and defendant Rose Marie Gilmont, or obligated to defend defendant Arthur Allen McKinzie in any other action which may be commenced against him by any of the defendants Gilmont arising out of the automobile accident which occurred on June 8, 1957?

III.

Is plaintiff under a duty or obligation to pay any judgment that may be entered in favor of any of the defendants Gilmont and against the defendant

Arthur Allen McKinzie resulting out of the facts and circumstances involved in the aforesaid accident?

IV.

Should the defendants Gilmont and each of them be restrained from instituting any legal proceedings against plaintiff for the recovery of any judgment that defendants Gilmont may hereafter obtain against Arthur Allen McKinzie?

V.

Was plaintiff careless and negligent in obtaining and completing the application for insurance from defendant Arthur Allen McKinzie?

VI.

Was plaintiff careless and negligent in investigating said automobile accident and the facts and circumstances concerning the driving record of defendant Arthur Allen McKinzie?

VII.

Has plaintiff waived any claimed defense of its insurance policy issued to defendant Arthur Allen McKinzie?

VIII.

Should plaintiff be barred and estopped from maintaining this suit or denying coverage of its insurance policy?

IX.

Has plaintiff been guilty of laches?

X.

Has plaintiff affirmed its contract of insurance with defendant Arthur Allen McKinzie?

XI.

Is plaintiff entitled to rescind its insurance contract or the coverage under its insurance policy?

Jury Trial

The defendants Gilmont have timely requested that this cause be tried by a jury.

Physical Exhibits

Plaintiff and defendants Gilmont admit the identity and authenticity of the following exhibits and waive further identification but reserve all objections to such exhibits on the grounds of relevancy, materiality and competency and the right to object to any of the questions propounded in any of the depositions and the answers thereto on the grounds of relevancy, materiality and competency and further agree that any party may offer an exhibit listed by any other party.

Plaintiff's Exhibits

1. Original copy of application for insurance policy No. 174380.
2. Duplicate original copy of receipt dated April 16, 1957 acknowledging partial payment of \$20.00 on account of initial premium due on policy No. 174380.

3. True copy of policy No. 174380.
4. Copy of form letter dated June 28, 1957 from home office of plaintiff, Mayflower Insurance Exchange, addressed to defendant Arthur Allen McKinzie.
5. Original automobile proof of loss executed by Arthur Allen McKinzie under date of July 26, 1957.
6. Draft No. D11688 issued by plaintiff, Mayflower Insurance Exchange, in the sum of \$945.45 and made payable to the order of defendant Arthur Allen McKinzie and City Finance Co.
7. Certified copy of motor vehicle driving record of defendant Arthur Allen McKinzie issued by James F. Johnson, Director, Department of Motor Vehicles, State of Oregon, dated September 3, 1957.
8. Copy of letter dated September 23, 1957 addressed to defendant Arthur Allen McKinzie.
9. Draft of plaintiff, Mayflower Insurance Exchange, dated September 18, 1957 made payable to the order of defendant Arthur A. McKinzie in the sum of \$20.00 which was enclosed with Plaintiff's Exhibit 8.
10. Copy of letter dated July 2, 1957 addressed to Oregon State Police, Bureau of Records, Salem, Oregon.
11. Original letter dated July 11, 1957 addressed to plaintiff, Mayflower Insurance Exchange, at its home office, Seattle, Washington.
12. Copy of letter dated July 18, 1957 addressed to State of Oregon, Department of Motor Vehicles, Salem, Oregon.
13. Original letter dated July 25, 1957 addressed

to plaintiff, Mayflower Insurance Exchange, at its home office, Seattle, Washington.

14. Copy of letter dated August 20, 1957 addressed to State of Oregon, Department of Motor Vehicles, Salem, Oregon.

15. Original letter dated August 23, 1957 addressed to plaintiff, Mayflower Insurance Exchange, at its claims office, Portland, Oregon.

16. Memorandum receipt No. 71883 dated September 4, 1957 issued by Department of Motor Vehicles of Oregon to plaintiff, Mayflower Insurance Exchange, for \$1.00 fee in connection with plaintiff's Exhibit 7.

17. Copy of letter dated October 29, 1957 addressed to State of Oregon, Department of Licenses, Financial Responsibility Division, Salem, Oregon.

18. Duplicate original copy of agreement dated January 15, 1958, between plaintiff, Mayflower Insurance Exchange and defendant Art Allen McKinzie.

19. Abstract of driving record of defendant Art Allen McKinzie certified by the Department of Motor Vehicles of the State of California to be photographic copies of the originals on file.

Exhibits of Defendants Gilmont

1. Deposition of Arthur Allen McKinzie and exhibits attached thereto.

2. Deposition of Donald Eugene Dorris.

3. Deposition of Ruben Edward Snyder.

4. Interrogatories of defendants Gilmont to Mayflower Insurance Exchange.

5. Answers of Mayflower Insurance Exchange to interrogatories propounded by defendants Gilmont.

6. Letter from Claims Department of Mayflower Insurance Exchange to Mr. Robert Gilmont dated June 13, 1957.

7. Oregon State Police Report of accident of June 8, 1957, between automobiles operated by Arthur Allen McKinzie and Robert Dean Gilmont.

8. Copy of complaint by Robert Dean Gilmont, plaintiff, vs. Arthur Allen McKinzie, defendant, in the Circuit Court of the State of Oregon for the County of Lincoln.

9. Copy of motion by Arthur Allen McKinzie in the case of Robert Dean Gilmont, plaintiff, vs. Arthur Allen McKinzie, defendant, in the Circuit Court of the State of Oregon for the County of Lincoln.

10. Copy of complaint by Rose Marie Gilmont, plaintiff, vs. Arthur Allen McKinzie, defendant, in the Circuit Court of the State of Oregon for the County of Lincoln.

11. Copy of motion by Arthur Allen McKinzie in the case of Rose Marie Gilmont, plaintiff, vs. Arthur Allen McKinzie, defendant, in the Circuit Court of the State of Oregon for the County of Lincoln.

12. Statement of amount due and cancellation notice from Mayflower Insurance Exchange to Arthur Allen McKinzie dated June 4, 1957.

13. Claim file of Mayflower Insurance Exchange

regarding accident of June 8, 1957, between automobiles operated by Arthur Allen McKinzie and Robert Dean Gilmont.

14. Form of Oregon Traffic Accident and Financial Responsibility Report.

15. Certified copy of motor vehicle driving record of defendant Arthur Allen McKinzie issued by Director, Department of Motor Vehicles of the State of Oregon, dated February 27, 1958.

16. Statement of Arthur Allen McKinzie dated July 26, 1957.

17. Copy of letter from Mayflower Insurance Exchange to St. Vincent's Hospital, dated July 19, 1957.

18. Memorandum communication from Mel Kosta, Claims Manager, Portland Office, Mayflower Insurance Exchange to Home Office, Mayflower Insurance Exchange.

19. Memorandum communication from Mel Kosta, Claims Manager, Portland Office, Mayflower Insurance Exchange to Home Office, Mayflower Insurance Exchange.

The parties have agreed to the foregoing pretrial order and the court being fully advised in the premises;

Now Therefore, It Is Hereby Ordered that the foregoing constitutes the pretrial order in the above entitled cause and supplements the pleadings herein and shall not be amended hereafter except to prevent manifest injustice or by consent of the parties.

Dated this 19th day of June, 1958.

/s/ WILLIAM G. EAST,
District Judge.

The foregoing form of Pretrial Order is hereby approved:

/s/ FRANK BOSCH
Of Attorneys for Plaintiff.

/s/ JACK L. KENNEDY
Of Attorneys for Defendants
Gilmont.

[Endorsed]: Filed February 19, 1958.

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL
ANSWER

Come now the Defendants Robert Dean Gilmont, Rose Marie Gilmont, and Susan Rose Gilmont, a minor, Robert Russell Gilmont, a minor, and Norman I. Gilmont, a minor, by Ronald A. Watson, guardian ad litem for said minors, and leave of Court being first had and obtained, files this their amended and supplemental answer to plaintiff's complaint and admit, deny and allege as follows:

I.

Defendants deny the allegations contained in paragraph I of plaintiff's complaint, except that defendants admit that all of the defendants are citizens of the State of Oregon and that the matter

in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs.

II.

Defendants admit the allegations contained in paragraph II of plaintiff's complaint.

III.

Defendants do not have any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph III of plaintiff's complaint and therefore deny the same, except that defendants admit that the plaintiff issued a certain policy of insurance to defendant Arthur Allen McKinzie which insured the said Arthur Allen McKinzie against public liability for personal injuries arising out of the operation of his certain 1951 Cadillac coupe automobile.

IV.

Defendants admit the allegations contained in paragraph IV of plaintiff's complaint.

V.

Defendants admit the allegations contained in paragraph V of plaintiff's complaint.

VI.

Defendants do not have any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph VI of plaintiff's complaint and therefore deny the same, except that defendants have been informed

and therefore admit that the driver's license of defendant Arthur Allen McKinzie had been suspended in the State of Oregon under date of February 14, 1956, for a period of one year and that defendant Arthur Allen McKinzie was convicted in the District Court of the State of Oregon, County of Benton, on February 14, 1956, for the traffic offense of "no muffler".

VII.

Defendants deny the allegations contained in paragraph VII of plaintiff's complaint.

VIII.

Defendants deny the allegations contained in paragraph VIII of plaintiff's complaint.

And for a first, separate and affirmative answer and defense, defendants Gilmont allege:

I.

On or about the 16th day of April, 1957, the plaintiff issued its insurance policy to defendant Arthur Allen McKinzie which insured the said Arthur Allen McKinzie against public liability for personal injuries or property damage arising out of the operation of his 1951 Cadillac coupe automobile.

II.

On or about the 8th day of June, 1957, near Toledo, Oregon, the defendant Arthur Allen McKinzie, while operating his motor vehicle which was

covered and insured by said insurance policy, was involved in a collision with the automobile owned and operated by Robert Dean Gilmont, and said collision resulted in personal injuries to all of the defendants Gilmont and damage to the automobiles owned by defendant Arthur Allen McKinzie and defendant Robert Dean Gilmont and said collision and personal injuries and damages occurred as a proximate result of the carelessness and negligence of defendant Arthur Allen McKinzie.

III.

Plaintiff received notice and knowledge of said accident immediately following said collision and thereafter investigated the facts and circumstances involved in said collision, and defendants are informed and believe and therefore allege that at said time the plaintiff knew or, in the exercise of reasonable care, should have known that defendant Arthur Allen McKinzie was operating his automobile without a valid driver's license from the State of Oregon.

IV.

Prior to said automobile accident and on or about the 7th day of June, 1957, plaintiff notified defendant Arthur Allen McKinzie that his automobile insurance would be canceled on June 14, 1957, unless a certain balance of the premium was paid before said cancellation date and thereafter and on or about the 28th day of June, 1957, plaintiff notified defendant Arthur Allen McKinzie that his automobile insurance was not in force because the pre-

mium had not been paid prior to the cancellation date.

V.

On or about the 26th day of July, 1957, plaintiff obtained proof of loss from defendant Arthur Allen McKinzie wherein the said Arthur Allen McKinzie released the plaintiff from all claims for damage to his 1951 Cadillac automobile which had resulted from said collision, and on or about July 31, 1957, plaintiff paid Arthur Allen McKinzie and City Finance Company the sum of \$945.45 in full satisfaction of said claim for property damage.

VI.

Plaintiff further failed to notify the Department of Financial Responsibility of the State of Oregon until October 29, 1957, that it was denying coverage under said insurancy policy.

VII.

At all times mentioned herein, the plaintiff, by and through its adjusters, negotiated with the attorneys for defendants Gilmont with respect to said personal injury claim of defendants Gilmont as if said insurance policy was in full force.

VIII.

During the month of December, 1957, defendant Robert Dean Gilmont and Defendant Rose Marie Gilmont commenced an action against defendant Arthur A. McKinzie in the Circuit Court of the State of Oregon for the County of Lincoln to re-

cover damages for the personal injuries that they sustained as a result of the carelessness and negligence of the said Arthur A. McKinzie, and on or about the 15th day of January, 1958, the plaintiff assumed the defense of the said Arthur A. McKinzie in the Circuit Court of the State of Oregon for the County of Lincoln and appeared therein by and through its attorneys and is presently defending the said Arthur A. McKinzie in said action for damages.

IX.

By reason of the foregoing acts and conduct, the plaintiff has waived any claimed defense under said insurance policy and it is barred and estopped from maintaining this suit or denying coverage under said insurance policy.

And for a second separate and affirmative answer and defense, Defendants Gilmont allege:

I.

Defendants Gilmont reallege paragraphs I, II, III, IV, V, VI, VII and VIII of their first separate and affirmative answer and defense and incorporate the same herein by reference as though fully set forth herein.

II.

Plaintiff has been guilty of laches and has further affirmed its contract of insurance with defendant Arthur A. McKinzie and is not entitled to rescind its insurance contract or the coverage under its insurance policy.

Wherefore, having fully answered plaintiff's complaint, defendants Gilmont pray that the same be dismissed and that plaintiff take nothing thereby and that these answering defendants be awarded their costs and disbursements incurred herein.

CRUM, WALKER & BUSS,
/s/ HOLLIE PIHL,
KRAUSE, LINDSAY & KENNEDY,
/s/ JACK L. KENNEDY,
Attorneys for Defendants Gilmont.

Duly Verified.

[Endorsed]: Filed March 10, 1958.

Plaintiff's Requested Instruction No. 1

If you find that defendant McKinzie failed to truthfully disclose in his answers to the questions in his application that any driver's license had previously been revoked or suspended, that he had received any driving charges, citations or fines during the three years prior to April 16, 1957, or that he had been involved in any auto accident as a driver during those three years, such failure to disclose these facts would constitute a concealment of a material fact, which would as a matter of law effect the acceptance of risk and the hazard assumed by the plaintiff insurance company, and would bar the recovery of all defendants on the policy here in question. It is not necessary that the plaintiff prove that all of these questions were answered falsely but it is sufficient if it is proven that any one of them was made and that it was false.

Plaintiff's Requested Instruction No. 2

Defendants Gilmont have contended and set up by way of defense to this action that plaintiff was negligent in obtaining and completing the application for insurance from defendant Arthur Allen McKinzie. You are instructed that there is no evidence from which you could find that plaintiff was negligent in obtaining and completing the application for insurance from defendant McKinzie and you will therefore completely disregard this contention and defense in determining this case.

Plaintiff's Requested Instruction No. 11

I instruct you as a matter of law that it was incumbent upon defendant McKinzie to give truthful answers to the questions put to him in the application which he signed and that in failing to give truthful answers to these questions he has misrepresented material facts upon which the plaintiff was entitled to rely. Therefore if you find that the plaintiff did rely upon these representations in issuing the policy, then none of the defendants herein can recover on the policy.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly empaneled and sworn to try the above-entitled cause, return our verdict in favor of the defendants Gilmont.

Dated this 20th day of June, 1958.

/s/ OTTO T. HOGG,
Foreman.

[Endorsed]: Filed June 20, 1958.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITH- STANDING THE VERDICT AND FOR A NEW TRIAL

Pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure plaintiff moves the court for an order setting aside the verdict heretofore received and filed and for the entry of judgment in favor of plaintiff notwithstanding said verdict.

This motion is made on the grounds and for the reason that plaintiff's motion for a directed verdict should have been granted because:

(1) There was no evidence that the plaintiff was negligent in obtaining and completing the application for insurance from defendant McKinzie;

(2) There was no evidence which would authorize a jury to return a verdict against plaintiff;

(3) The evidence in the case was uncontradicted and conclusively proved that defendant McKinzie intentionally made a false and material representation for the purpose of inducing the plaintiff to issue its automobile liability policy and that plaintiff, acting in reliance thereon, has suffered injury.

In the event that the foregoing motion is denied plaintiff then moves, in the alternative, for an order granting a new trial.

Plaintiff's motion for an order granting a new trial is made upon the following grounds:

(1) The verdict was against the overwhelming weight of the evidence;

(2) The verdict was based upon the court's instruction to the jury that they could find for defendants on either one of two theories, one of which would not support a recovery under the facts;

(3) The verdict returned and filed herein is in favor of defendants Gilmont only. No judgment can be entered herein in favor of defendant McKinzie for the reason there is no verdict upon which to base such a judgment. Under the law of the case defendants Gilmonts' rights are derivative from defendant McKinzie and therefore the verdict is defective and no judgment in favor of the defendants, or any of them, can be entered thereon;

(4) There is absolutely no evidence from which a jury could find that the plaintiff was careless and negligent in obtaining and completing the application for insurance from defendant McKinzie

and defendants Gilmont therefore failed to bear the burden of proof upon this issue and the same should not have been submitted to the jury;

(5) The uncontradicted evidence proved that defendant McKinzie made false representations in the application and this issue should not have been submitted to the jury;

(6) The uncontradicted evidence proved that one or more of the representations were material and any finding by the jury that the same were not material must have been arbitrarily based upon conjecture and speculation notwithstanding the overwhelming evidence to the contrary.

/s/ FRANK McK. BOSCH,
Attorney for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 27, 1958.

[Title of District Court and Cause.]

ORDER

This matter came on for hearing upon the plaintiff's motion for judgment in its favor notwithstanding the verdict herein or in the alternative for a new trial, and the Court having considered the written memoranda filed and the oral statements of counsel and not being advised in the matter, took the matter under advisement, and the Court now being advised,

It Is Hereby Considered, Adjudged and Ordered that the aforesaid motion and the alternative are each hereby denied.

Dated November 3, 1958.

/s/ WILLIAM G. EAST,
United States District Judge.

[Endorsed]: Filed November 3, 1958.

[Title of District Court and Cause.]

COST BILL

Statement of costs and disbursements claimed by defendants Gilmont in the above-entitled cause:

Attorneys' docket fees.....	\$20.00
Deposition of Donald Eugene Dorris.....	31.00*
Deposition of Rueben Edward Snyder.....	28.00

*[Note: This line deleted with notation "See Order dated 12/15/58.]

Director of Motor Vehicles, certified copy
of driving record of Arthur A. McKinzie 1.00

Witness Fees:

Sgt. William Colbert, 1 day, 230 miles... 22.40

Total..... \$71.40

December 23, 1958.

Costs taxed at \$71.40.

R. DE MOTT,

Clerk,

/s/ By V. O. BISHOP,

Chief Deputy.

United States of America

District of Oregon—ss.

I, Jack L. Kennedy, being first duly sworn, depose and say that I am one of the attorneys for the defendants Gilmont in the within-entitled cause, that the disbursements set forth herein have been necessarily incurred in the defense of said cause, and that the defendants Gilmont are entitled to recover the same from the plaintiff.

/s/ JACK L. KENNEDY.

Subscribed and sworn to before me this 7th day of November, 1958.

[Seal] /s/ IRENE M. PERALA,
Notary Public for Oregon. My commission expires
April 10, 1962.

Notice

To: Mayflower Insurance Exchange, Plaintiff, and
to Arthur S. Vosburg and Frank McK. Bosch,
its attorneys:

Please take notice that the defendants Gilmont
will apply to the Clerk of the above-entitled court
to have the within cost bill taxed on November 12,
1958, at the hour of 10:00 a.m.

/s/ JACK L. KENNEDY

Of Attorneys for Defendants
Gilmont.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 7, 1958.

[Title of District Court and Cause.]

ORDER OF DEFAULT

This matter coming on for hearing before the
undersigned Judge on November 21, 1958, on the
motion of plaintiff for the entry of an Order of
Default and Judgment against defendant McKin-
zie; plaintiff appearing by one of its attorneys,
Frank McK. Bosch, and defendants Gilmont ap-
pearing by and through one of their attorneys,
Jack L. Kennedy; and the court having heard the
arguments of respective counsel and being fully ad-
vised in the premises;

Now Therefore, It Is Hereby Ordered and Ad-
judged that an Order of Default be and it is hereby
entered against defendant Arthur Allen McKinzie.

Dated November 21, 1958.

/s/ WILLIAM G. EAST,
District Court Judge.

[Endorsed]: Filed December 2, 1958.

United States District Court
District of Oregon
Portland 5, Oregon

William G. East
United States District Judge

December 2, 1958

Mr. Jack L. Kennedy, Krause, Lindsay & Kennedy,
Attorneys at Law, Portland Trust Building,
Portland 4, Oregon

Mr. Frank McK. Bosch, Vosburg, Joss, Hedlund &
Bosch, Attorneys at Law, 909 American Bank
Building, Portland 5, Oregon

Re: *Mayflower Insurance Exchange v. Arthur Allen
McKinzie, et al.* Civil No. 9405.

LETTER OPINION

Gentlemen:

This will acknowledge the letter of Mr. Kennedy under date of November 24 enclosing a form of judgment order. Also the letter of Mr. Bosch under date of November 26 enclosing a proposed form of order of default as to the defendant McKenzie, and likewise Mr. Kennedy's letter under date of No-

vember 29 in opposition to the request of Mr. Bosch in his letter of November 26.

It is my belief that pursuant to Rule 55 (b) (2) of the Federal Rules of Procedure, the plaintiff is entitled to have the Court enter an order of default against the defendant McKinzie for his failure to plead or otherwise appear in the action. At the hearing on November 21 I was under the impression that the Clerk could enter the default, but, inasmuch as the claim of the plaintiff was not liquidated, I feel that subsection (2) of Rule 55 applies. This Court is of the opinion that the defendant McKinzie, by his failure to appear in this cause, can in nowise defeat what legal claims the defendants Gilmont might have against the plaintiff by reason of the plaintiff's insurance policy issued to the defendant McKinzie and which the Court held to have been in full force and effect as of the date of the accident from which arose the claims of the defendants Gilmont against the defendant McKinzie and his insurer in the event of a judgment upon the merits against the defendant McKinzie.

This Court feels that the plaintiff is entitled to have an order of default against the defendant McKinzie in the form submitted in Mr. Bosch's letter under date of November 26. Therefore, the order has been entered as of November 21 in conformity with the Court's oral statement.

This Court feels that this order of default is in nowise an order constituting a determination of the merits of the alleged cause of action of the defendants Gilmont against the defendant McKinzie and

is merely a determination of the status of the plaintiff's policy of insurance issued to the defendant McKinzie as of the times and dates involved in the litigation before this Court.

Accordingly, the judgment order as submitted in Mr. Kennedy's letter under date of November 24 is entered as of this date of December 2.

Very truly yours,

/s/ WILLIAM G. EAST.

[Endorsed]: Filed December 2, 1958.

In the United States District Court
for the District of Oregon

Civil No. 9405

MAYFLOWER INSURANCE EXCHANGE,
Plaintiff,

vs.

ARTHUR ALLEN McKINZIE, ROBERT DEAN
GILMONT, ROSE MARIE GILMONT, and
SUSAN ROSE GILMONT, a minor, ROB-
ERT RUSSELL GILMONT, a minor, and
NORMAN I. GILMONT, a minor, by RON-
ALD A. WATSON, Guardian ad Litem for
said minors, Defendants.

JUDGMENT ORDER

The above-entitled cause having come on regularly for trial on the 18th day of June, 1958, before

the undersigned Judge of the above-entitled Court, plaintiff appearing by R. T. Carlson, its underwriting manager, and by Arthur S. Vosburg and Frank McK. Bosch, its attorneys, and defendants Robert Dean Gilmont and Rose Marie Gilmont appearing in person and by Jack L. Kennedy and Hollie Pihl, their attorneys, and defendants Susan Rose Gilmont, Robert Russell Gilmont and Norman I. Gilmont appearing by Ronald A. Watson, their guardian ad litem, and by Jack L. Kennedy and Hollie Pihl, their attorneys, and defendant Arthur Allen McKinzie appearing neither in person nor by counsel, and a jury having been duly selected and sworn to try the above-entitled cause, the parties each having made opening statements, adduced evidence in support of their contentions, certain objections and motions having been made during the trial and ruled on by the Court and thereafter the matter having been argued to the jury and the jury having been duly instructed and having retired and thereafter returned with its verdict which omitting the caption and title was as follows:

“We, the jury, duly empaneled and sworn to try the above-entitled cause, return our verdict in favor of the defendants Gilmont.

“Dated this 20th day of June, 1958.

Otto Hogg
Foreman”

and thereafter the jury having been polled and each member of said jury having stated that this

was their verdict and said verdict being duly received and filed by the Court and thereafter the plaintiff having filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial, and the Court having considered memoranda and oral statements of counsel and having taken the matter under advisement and on the 3rd day of November, 1958, having denied plaintiff's motion for judgment notwithstanding the verdict or in the alternative for a new trial and thereafter on the 21st day of November, 1958, the plaintiff having moved the Court for an order of default against defendant Arthur Allen McKinzie and the Court on the same date having directed that the default of the defendant Arthur Allen McKenzie be entered of record herein, and the Court now being fully advised:

Now Therefore, it is hereby Ordered and Adjudged that plaintiff's complaint for a declaratory judgment be and the same is hereby dismissed and that plaintiff take nothing herein against the defendants.

It is further Ordered and Adjudged that policy No. 174380 issued by plaintiff, Mayflower Insurance Exchange, on or about April 16, 1957, to Arthur A. McKinzie be and the same is hereby declared to be a valid policy of insurance and in full force and effect and binding on the plaintiff on or about June 8, 1957, being the date of an automobile accident between automobiles operated by defendant Arthur Allen McKenzie and defendant Robert Dean Gilmont.

It is further Ordered and Adjudged that plaintiff was and is under a duty and obligation to defend defendant Arthur Allen McKinzie in any action, suit or proceedings that may be pending or brought or instituted against him arising out of said automobile accident which occurred on or about June 8, 1957, at a point on U. S. Highway No. 20 approximately 6.5 miles east of Toledo, Oregon.

It is further Ordered and Adjudged that plaintiff is under a duty and obligation to pay any judgment that may be entered against defendant Arthur Allen McKinzie arising out of said automobile accident to and including the amount of insurance contained in said insurance policy.

It is further Ordered and Adjudged that defendants Robert Dean Gilmont and Rose Marie Gilmont and Susan Rose Gilmont, Robert Russell Gilmont and Norman I. Gilmont, and each of them, are not restrained and are entitled to institute legal proceedings against plaintiff for the recovery of the amount of any judgment that said defendants, or any of them, may obtain against defendant Arthur Allen McKinzie to and including the amount of insurance contained in said insurance policy.

It is further Ordered and Adjudged that defendants Gilmont have, take and recover judgment of and from the plaintiff for their costs and disbursements incurred herein taxed and allowed in the sum of \$. and that execution issue therefor.

Dated this 2nd day of December, 1958.

/s/ WILLIAM G. EAST,
United States District Judge.

Presented by:

/s/ JACK L. KENNEDY
Of Attorneys for Defendants
Gilmont.

[Endorsed]: Filed December 2, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Mayflower Insurance Exchange, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 2, 1958.

/s/ FRANK McK. BOSCH
Of Attorneys for Plaintiff,
Mayflower Insurance Exchange.

[Endorsed]: Filed December 30, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents: That we, Mayflower Insurance Exchange, as Principal, and American Insurance Company, a New Jersey Corporation authorized to act as surety under the laws of the State of Oregon, are bound to pay to Robert

Dean Gilmont, Rose Marie Gilmont and Ronald A. Watson, Guardian ad Litem for Susan Rose Gilmont, a minor, Robert Russell Gilmont, a minor, and Norman I. Gilmont, a minor, the sum of Two Hundred Fifty Dollars (\$250.00);

Whereas the plaintiff is about to appeal to the Court of Appeals for the Ninth Circuit from the judgment of this court entered on December 2, 1958, Therefore the Condition of This Bond Is that if the plaintiff shall pay all costs adjudged against it, if its appeal is dismissed, or said judgment affirmed, or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated this 30th day of December, 1958.

MAYFLOWER INSURANCE
EXCHANGE,
Plaintiff,

/s/ By FRANK McK. BOSCH,
One of Its Attorneys,
Principal.

[Seal] AMERICAN INSURANCE
COMPANY,

/s/ By STANLEY P. DWYER,
Surety.

Countersigned:

/s/ C. R. RATHBURN,
Oregon Resident Agent.

[Endorsed]: Filed December 30, 1958.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME
WITHIN WHICH TO FILE RECORD
AND DOCKET APPEAL

Comes now plaintiff, appearing by and through one of its attorneys, Frank McK. Bosch, and moves the court for an order extending until March 9, 1959, the time for filing the Record on Appeal herein with the United States Court of Appeals for the Ninth Circuit and for docketing the Appeal taken by plaintiff by its Notice of Appeal filed herein on December 30, 1958. In support thereof plaintiff's said attorney has been advised by Mr. Jack Ellis, the court reporter who reported the testimony of the witnesses at the trial of the above entitled action, that due to prior commitments for transcripts of earlier proceedings in other cases that he will not be able to complete transcribing the testimony of said witnesses until February 25, 1959. That the time originally prescribed by Rule 73 (g) of the Federal Rules of Civil Procedure has not yet expired and no previous extension of time has been heretofore granted. That the Record of Appeal herein cannot be designated by plaintiff until after its attorneys have had reasonable time to examine the transcribed testimony.

/s/ FRANK McK. BOSCH,
Attorneys for Plaintiff.

It Is Hereby Stipulated by all of the defendants Gilmont, acting by and through one of their attor-

neys of record, that subject to the approval of the court, plaintiff may have an extension of time as requested above.

/s/ JACK L. KENNEDY
Of Attorneys, Defendant
Gilmont.

[Endorsed]: Filed January 20, 1959.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

Upon motion of Plaintiff supported by stipulation of defendants Gilmont, and good cause appearing therefrom and the court being fully advised;

Now, Therefore, It Is Hereby Ordered that the time for filing the Record on Appeal herein with the United States Court of Appeals for the Ninth Circuit and for docketing therein the Appeal taken by plaintiff by its Notice of Appeal filed December 30, 1958, is hereby extended to March 9, 1959, pursuant to Rule 73 (g) of the Federal Rules of Civil Procedure.

Dated this 20th day of January, 1959.

/s/ WILLIAM G. EAST,
Judge.

[Endorsed]: Filed January 20, 1959.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD TO BE CONTAINED IN THE RECORD ON APPEAL

Appellant Mayflower Insurance Exchange, designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Complaint and Summons.
2. Answer of defendants Gilmont.
3. Amended and Supplemental Answer of defendants Gilmont.
4. Pretrial Order.
5. Verdict.
6. Motion for Judgment notwithstanding the Verdict and for a New Trial.
7. Order Denying Motion for Judgment notwithstanding the Verdict and for a New Trial.
8. Order of Default against defendant McKinzie.
9. Judge East's letter of Opinion dated December 2, 1958.
10. Judgment Order.
11. Cost Bill.
12. Notice of Appeal.
13. Bond for Costs on Appeal.
14. Motion for Extension of Time Within Which to File Record and Docket Appeal.
15. Order Extending Time for Filing Record and Docketing Appeal.
16. Reporter's Transcript of the Trial Testimony, Evidence and Proceedings at the Trial.

17. All Exhibits Offered and Received in Evidence.

18. Instructions Requested by Plaintiff Mayflower Insurance Exchange Nos. 1, 2 and 11.

19. Statement of Points Upon Which Appellant Will Rely.

20. This Designation of Record.

21. Motion and Stipulation for Order to Transport Original Exhibits.

22. Order to Transport Original Exhibits.

/s/ FRANK McK. BOSCH,
Of Attorneys for Appellant
Mayflower Insurance Exchange.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 4, 1959.

[Title of District Court and Cause.]

MOTION AND STIPULATION FOR ORDER
TO TRANSPORT ORIGINAL EXHIBITS

Comes now the plaintiff by and through one of its attorneys, Frank McK. Bosch, and moves the court for an order directing the Clerk of the above entitled court to transport to the Clerk of the United States Court of Appeals for the Ninth Circuit the original of all exhibits offered and received in evi-

dence for the inspection and use of the Appellate Court in lieu of copies thereof and for their care, custody and control and return in the same manner in which they are sent.

In support of this motion plaintiff, by and through one of its attorneys, Frank McK. Bosch, represents that an appeal has been taken in the above entitled matter from the above entitled court to the United States Court of Appeals for the Ninth Circuit and that it is plaintiff's belief that the Appellate Court would gain a better understanding by having said original exhibits before them for their inspection and use and further that there will be a saving of cost if said originals are sent to the Clerk of the Appellate Court rather than having copies made thereof.

/s/ FRANK McK. BOSCH,
Of Attorneys for Plaintiff.

It Is Hereby Stipulated that defendants' Gilmont, acting through one of their attorneys of record, that subject to the approval of the Court, the foregoing Motion may be granted.

/s/ JACK L. KENNEDY,
Of Attorneys for Defendants'
Gilmont.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 4, 1959.

[Title of District Court and Cause.]

ORDER TO TRANSPORT ORIGINAL
EXHIBITS

Upon the motion of plaintiff, support by the stipulation of the defendants' Gilmont, and good cause appearing therefrom, and the court being fully advised;

Now, Therefore, It Is Ordered that the Clerk of the above entitled Court is authorized and directed to transport all of the original exhibits offered and received in the trial of the above entitled case for the inspection and use of the Appellate Court in lieu of copies thereof and for the care, custody and control and return of said original exhibits in the same manner in which they are sent.

Dated this 4th day of March, 1959.

/s/ WILLIAM G. EAST,
District Judge.

[Endorsed]: Filed March 4, 1959.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT MAYFLOWER INSURANCE EXCHANGE INTENDS TO RELY ON APPEAL

On appeal appellant Mayflower Insurance Exchange will rely on the following points:

I.

The court erred, after defendants had rested, in denying plaintiff's motion for a directed verdict against all defendants on the grounds and for the reason that:

(a) The evidence clearly and conclusively proved all of the allegations of plaintiff's complaint so that there was no issue to be submitted to the jury and therefore plaintiff was entitled to a directed verdict.

(b) Defendants, and each of them, had failed to adduce any evidence whatsoever negating the right of plaintiff to the relief requested in its complaint so that there was no issue to be submitted to the jury and plaintiff was entitled to a directed verdict.

(c) Defendant McKinzie had not denied any of the allegations of plaintiff's complaint.

II.

The court erred in entering judgment based upon the verdict rendered on the grounds and for the reason that:

(a) The evidence clearly and conclusively proved all of the allegations of plaintiff's complaint so that there was no issue to be submitted to the jury and therefore plaintiff was entitled to a directed verdict.

(b) Defendants, and each of them, had failed to adduce any evidence whatsoever negating the right of plaintiff to the relief requested in its complaint so that there was no issue to be submitted to the jury and plaintiff was entitled to a directed verdict.

(c) The verdict rendered was defective in that it was in favor of defendants Gilmont only and did

not mention the defendant McKinzie, against whom an order of default had been entered.

(d) The verdict rendered did not authorized a judgment in favor of defendants Gilmont and against plaintiff.

III.

The court erred in denying plaintiff's motion for a judgment notwithstanding the verdict on the grounds and for the reason that:

(a) The evidence clearly and conclusively proved all of the allegations of plaintiff's complaint so that there was no issue to be submitted to the jury and therefore plaintiff was entitled to a directed verdict.

(b) Defendants, and each of them, had failed to adduce any evidence whatsoever negating the right of plaintiff to the relief requested in its complaint so that there was no issue to be submitted to the jury and plaintiff was entitled to a directed verdict.

(c) Defendant McKinzie had not denied any of the allegations of plaintiff's complaint.

IV.

The court erred in denying plaintiff's motion for a new trial because of errors of law occurring at the trial duly excepted to by the plaintiff, to-wit:

(a) The court failed to give plaintiff's requested instruction No. 2 reading as follows:

"Defendants Gilmont have contended and set up by way of defense to this action that plaintiff was negligent in obtaining and completing the application for insurance from defendant Arthur Allen

McKinzie. You are instructed that there is no evidence from which you could find that plaintiff was negligent in obtaining and completing the application for insurance from defendant McKinzie and you will therefore completely disregard this contention and defense in determining this case.

(b) The court erred in instructing the jury as follows:

“Now members of the jury, there is a second issue which is raised by the contention of the defendants Gilmont as to whether or not the agent at the time he took the answers from McKinzie acted with ordinary, reasonable care for the protection of his own company, and in that connection you are charged that the defendants Gilmont have charged that the plaintiff, acting through the agent who took the application, was careless and negligent in obtaining and completing the application of insurance from McKinzie.

“You are instructed, members of the jury, that negligence as ordinarily defined, is a failure to do that which an ordinary, reasonable prudent person would do under the same or similar circumstances, or doing that which an ordinarily reasonable prudent person would not do under the same or similar circumstances.

“Therefore, if you should find from the evidence that the plaintiff, acting through its agent, was careless and did not act as a reasonably prudent person, being an insurance company, in obtaining

the answers from McKinzie while filling out the application for insurance by Mr. McKinzie, and thereby blindly or recklessly put down defendant's answers to the questions without reasonable credence, you should then find that the plaintiff is not entitled to be relieved of obligation under its policy because then through such action and conduct he would have been, become a party to the transaction.

"However, if you find that the plaintiff's agent while taking down the answers acted reasonably in accepting the answers given to him by McKinzie, then McKinzie is bound by his own doings as you shall find them from all of the evidence in the case subject to these instructions."

Transcript of Proceedings p. 260-261.

(c) There is no evidence from which the jury could find that plaintiff was negligent in obtaining and completing the application of insurance from defendant McKinzie.

(d) The court failed to give plaintiff's requested instruction No. 11 reading as follows:

"I instruct you as a matter of law that it was incumbent upon defendant McKinzie to give truthful answers to the questions put to him in the application which he signed and that in failing to give truthful answers to these questions he has misrepresented material facts upon which the plaintiff was entitled to rely. Therefore if you find that the plaintiff did rely upon these representations in issuing the policy, then none of the defendants herein can recover on the policy."

(e) The verdict was against the overwhelming weight of the evidence.

Respectfully submitted,

/s/ ARTHUR S. VOSBURG,

/s/ FRANK McK. BOSCH,

Attorneys for Appellant

Mayflower Insurance Exchange.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 5, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint for Declaratory Judgment, Summons, Answer of defendants Gilmonts (offered and received as plaintiff's exhibit No. 21), Pretrial Order, Amended and Supplemental Answer of defendants Gilmonts (offered and received as Defendant's Exhibit No. 34), Verdict, Motion for judgment notwithstanding the verdict and for a new trial, Order on motion for judgment notwithstanding verdict and for new trial, Defendants' Cost Bill, Order of Default as to defendant Arthur Allen McKinzie, Judge East's Letter Opinion, Judgment Order, Notice of

Appeal, Bond for Costs on Appeal, Motion for extension of time to file and docket appeal, Order extending time for filing and docketing appeal, Appellant's designation of portions of record, Motion and Stipulation for order to transport original exhibits, Order to Transport original Exhibits, Statement of Points and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9405, in which Mayflower Insurance Exchange is plaintiff and appellant, and Robert Dean Gilmont, et al. are defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and in accordance with the rules of this court.

I further certify that there is enclosed herewith defendants' Exhibits numbered 21, 22, 24, 25, 26, 27, 28, 29, 30, 33, 35, 36, 37, 38, and 39; and plaintiff's Exhibits numbered 1, 2, 3, 7, 8, 9, 18, 19a, 19b, 19c, 19d, 22 and 23. Also enclosed are plaintiff's requested instructions numbered 1, 2 and 11, being number 18 of appellant's designation and not filed in this office.

I further certify that we are mailing under separate cover the reporter's transcript of testimony, dated June 18, 19, 20, 1958, filed in this office in this cause.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my

hand and affixed the seal of said court in Portland,
in said District, this 5th day of March, 1959.

[Seal] R. DeMOTT,
 Clerk,

/s/ By MILDRED SPARGO,
 Deputy Clerk.

United States District Court,
District of Oregon

Civil No. 9405

MAYFLOWER INSURANCE EXCHANGE,
 Plaintiff,

vs.

ARTHUR ALLEN McKINZIE, ROBERT DEAN
GILMONT, et al., Defendants.

TRANSCRIPT OF PROCEEDINGS

Before Honorable William G. East, U. S. District
Judge.

U. S. Courthouse
Portland, Oregon
June 18, 19, 20, 1958

Appearances: Messrs. Frank Bosch and Arthur
S. Vosburg, Attorneys for Plaintiff; Messrs. Jack
L. Kennedy and Hollie Pihl, Attorneys for Defend-
ants Gilmont.

(Whereupon the following proceedings were had:) [1]*

The Court: This is the time fixed for the trial of Mayflower Insurance Exchange vs. Arthur Allen McKinzie and others. Now, I will say to counsel that I am still engaged and will be for some several hours yet today on this case that was being tried yesterday. So, at this time we can select a jury and then recess the matter until we finish this other matter. Counsel ready?

Mr. Bosch: Plaintiff is ready, your Honor.

Mr. Kennedy: Defendants Gilmont are ready, your Honor.

If the Court please, Mr. Ronald Watson, a member of the bar of this court, was appointed guardian ad litem——

The Court: Yes.

Mr. Kennedy: ——for the minor children of Mr. and Mrs. Gilmont. He is presently in the court at this time. Of course, he will not be a witness. I wondered if he could be excused.

The Court: Do you wish to be excused, Mr. Watson?

Mr. Watson: Well, I don't believe there is any reason for me to be here unless your Honor would wish me here.

The Court: No. I don't know of any reason. I think we can protect the minors' interest on the

* Page numbers appearing at top of page of Reporter's Transcript of Record.

selection of the jury. So if you wish to be excused you may be so excused.

Mr. Watson: Thank you, your Honor.

Mr. Kennedy: Thank you, your Honor.

The Court: Call the jury. [2]

(At this point a jury was called, selected, and sworn to try the case.)

The Court: Plaintiff's opening statement.

Mr. Bosch: Your Honor, and Ladies and Gentlemen of the jury: As you know this is the point at which the respective attorneys take the opportunity of advising you what their respective cases are about, what they will expect to prove, and in general just give you a little thumbnail sketch of what you can expect to hear as the case proceeds.

It might help you as you listen to the testimony and hear the evidence that will be brought before you here today and tomorrow to know a little bit about the circumstances which give rise to this lawsuit. As the Court told you this morning, it is what we call a declaratory judgment suit which was initiated by Mayflower Insurance Exchange, and that is an insurance company. We will more or less be referring to it more or less back and forth as the insurance company in this case and a man named Arthur Allen McKinzie who is referred to as the insured or the alleged insured and various members of the Gilmont family.

This case is somewhat unique in this respect that Mr. McKinzie who is named as one of the defendants, he was served with a summons and complaint here, and who is a very important party to this

case, has not appeared. He does not appear in person nor by his attorneys. However, we do have [3] the deposition of Mr. McKinzie which is, as you know, a question and answer thing which was taken by myself and Mr. Kennedy some time ago in preparation of the trial.

We have also a number of other documents which were concerned with Mr. McKinzie at one stage or another of this case.

In the chronological sequence of the facts which bring us up to the trial of this case, I probably should correctly start with the events which occurred in April of 1957 on the 16th day. That is the day that Mr. McKinzie presented himself to the southeast district office of Mayflower Insurance Exchange, advised the representative that was on duty at that time that he wished to have the company issue to him an automobile liability policy.

I am sure that most of you are familiar with what that is. It's intended to protect a person in the operation of his automobile from liability which may accrue because of injury to other parties.

This particular policy also afforded him some coverage for property damage. Now, the way these things are started and, perhaps, most of you know this, is that the agent who had never seen Mr. McKinzie before, Mr. McKinzie had no prior dealings with this particular insurance company—so they were strangers to each other. The agent picked out what we will call an application. Almost all companies use [4] them. I don't know of any company that wouldn't. That is the prime purpose for

getting the information necessary to permit the company to make a decision as to whether they will write this particular policy or not.

It of course starts out with very pertinent facts as to the name and the address and occupation and then goes on as to what kind of coverage he wants, a description of his automobile, and goes on to certain other salient facts which are necessary for the company to make their decision.

Some of these are down in the body of the application and they refer to previous driving record, whether he had any suspensions or revocations of his license, and any citations, any previous insurers. In other words, facts which would permit the company to determine whether they want to write this kind of a policy or not, or this kind of a risk.

Now, in this application as it will develop before you, Mr. McKinzie for reasons I suppose that are best known to him gave negative answers to each one of these questions. And as it turned out later when the company had knowledge of it, a number of these questions were false and materially so. I mean, it wasn't just a matter of an inadvertence, overlooking one parking ticket, or something like that. They were rather substantial violations, accidents, and whatnot, that he had a complete blank on. [5]

Then to cut short somewhat, this application goes to the home office of the company in Seattle and in due course they issued to Mr. McKinzie the policy which he applied for. And, things go on then for some time until June 8th of that same year when

Mr. McKinzie was driving his automobile here on one of the state highways on his way from, as I remember, the Coast, inland. He was on his way to Dallas, as I recall. And some place down there there was a head-on automobile accident. The other automobile was owned and operated by Mr. Gilmont and he was at that time accompanied by the members of his family. There was property damage and personal injuries to occupants of both automobiles.

The matter came to the attention of the insurance company first, as I recall, on some information from the people at the hospital where some of the injured parties were taken. And, in due course the file was referred to the adjusting department of the insurance company and an adjuster went out on the road down to the scene of the accident to determine what he could about the facts and also as to who was injured and the extent of those injuries.

To cut, again, somewhat short a long, detailed story of the investigation of the facts of this accident, suffice it to say that in the course of investigating this accident the company first learned by information from the State of Oregon that Mr. McKinzie had falsely represented to [6] them the fact that he had been suspended by the State of Oregon on his Oregon permit; that he had had a citation within three years prior to the time of this application. And then when we took the deposition of Mr. McKinzie, which I have referred to before, it further developed that not only were there

citations here in Oregon and a suspension, but there were also violations down in the State of California.

He also told us then for the first time that he had had previous insurers. And I think that's about all.

But, in any event, for the first time some time after the accident the company was advised that Mr. McKinzie had misrepresented to them his capacity to be insured in this company.

Now, as the Court will instruct you, in a case like this it is necessary for these various questions to have some materiality to the risk. It certainly isn't important if a man asked an applicant for insurance if his eyes are blue and he answers that they are brown. That has nothing to do with the risk. But, these questions as to his prior driving record, his prior insurance carriers, his various citations and violations of the law in driving his automobile—and we are not talking about parking citations—those things are all very important to these insurance companies.

I assume that you are all familiar with our current [7] automobile policy rates. It's becoming more important that these companies try to get what they refer to as good risks. And that's why they ask these questions. They are not idly asked.

So, as soon as the company determined that they had been acting upon false information they immediately wrote to Mr. McKinzie—and this is after the accident—wrote to Mr. McKinzie, tendered to him the premium which he had originally paid the date he signed the application, and advised him

that they were then electing to disaffirm the contract and consider it to be void in the first instance, for the reason that they had written it in reliance upon his false, fraudulent representations.

It is not sufficient for the company, of course, to just write Mr. McKinzie a letter to that effect. The matter doesn't rest there. That's what brings us to this court for a judicial determination as to whether or not the company was entitled under these particular facts to disaffirm the contract, consider it to be void with the effect that they will disclaim any responsibility for this particular accident or to the parties who were injured in it.

Naturally, the Gilmonts will bring before you certain facts which they will expect to persuade you with to a different result than I have given you. But I think it is most important in this case for you members of the jury to [8] keep in mind that the way this case should hang or turn should be determined on what was done the day that this man walked in to make his application for the insurance. If he gave at that time false information which was material then and the company relied upon that and issued the policy, then anything that comes after that is, to my mind, not important.

In other words, if he told the truth we are prepared to establish that the policy would never have been written and we wouldn't be here today. But he didn't tell the truth and the company issued the policy in reliance on his statements and the company should not be obliged to accept a liability which they

find themselves potentially in because of the misrepresentations of Mr. McKinzie.

Putting it quite simply, McKinzie should not be able to take advantage of his own misleading statements. All we can ask, however, in this case is that you members of the jury remember your oath and that is to consider the testimony which you will hear here; that together with the documentary evidence, and then weigh all those impartially as best you can under the instructions of the Court given you at the close of the case. We can expect no more and we ask no more. Thank you.

The Court: Defendants' opening statement.

Mr. Kennedy: If the Court please, Mr. Vosburg and Mr. Bosch, Ladies and Gentlemen: I am afraid my understanding [9] of the facts of the situation might be a little bit different in this case. I will say this before I commence, that it is my understanding of the purpose of this opening statement for the lawyers to give you a more or less bird's-eye view of what the case is all about and to tell you what the issues are involved in the case and what each side expects to prove.

Now, I have no intention of arguing the case at this time. I will be given the right to argue the case after you have heard all of the testimony.

Now, I might also mention one other comment which occurs quite often. Anything that I might say or that Mr. Bosch might say regarding the exhibits or regarding the witnesses isn't necessarily evidence in this case. I mean, the evidence will come from the witnesses on the witness stand and

the exhibits that are introduced. And you ladies and gentlemen have the province to determine exactly what the facts are. And as far as the law is concerned, such as materiality or right to rely on any statements in the application, Judge East will instruct you as to that. I mean, it isn't the lawyers' province to attempt to tell you what the law is.

Now, the parties, as you know, in this case are the Mayflower Insurance Exchange, the insurance company, which is a Washington insurance corporation, and, of course, it's authorized to issue insurance in this particular state. [10]

Mr. McKinzie entered into an insurance contract with the insurance company around about April 16th, I believe, 1957. All of the events occurred approximately a year ago.

The plaintiff and Mrs. Gilmont and their three minor children, residents of Toledo, Oregon, were, both of them, and their children, quite seriously injured in the automobile accident which has been referred to as having occurred on June 8th, 1957.

Now, I would like to go back just very briefly and give you a chronological course of events which occurred in this case and which I believe will be substantiated by the evidence. The application for the insurance was entered into and the policy was issued, I believe, effective April 16, 1957. Mr. McKinzie traded in an automobile at that time in to a parking lot here in Portland and he was referred, I believe, to Mayflower Insurance Company and to a finance company.

He arrived at the office of the finance company

quite late—excuse me—at the office of the insurance company quite late in the afternoon. I believe the evidence will show that it was approximately 6:00 o'clock. It was closing time. There was one man present, Mr. Snyder, who sits in the back of the courtroom. Mr. Snyder took the application and he wrote out the—he completed the whole application. I mean, he wrote out the names and make of [11] car, answered all of the questions, and Mr. McKinzie—Mr. McKinzie signed it. Excuse me. I have one of these summer colds that you can't get rid of.

In any event, the application was then submitted to the insurance company. In the normal course of events, of course, the policy was issued to Mr. McKinzie and for all intents and purposes I assume he imagined that he was insured.

What he secured was an insurance policy which insured him in the amount of \$10,000 for any one—for any injuries to any one person, and \$20,000 for injuries resulting out of any one accident, or all claims out of one accident.

Now, the accident occurred on June 8th, 1957, which was approximately about a little less than two months later. The accident occurred when Mr. McKinzie was on the wrong side of the road, ran head on into the Gilmont—Mr. and Mrs. Gilmont's automobile.

All the parties were seriously injured including Mr. McKinzie, and were taken to the hospital.

The insurance company received notice of the accident more or less immediately. I don't know how many days it was afterwards. I assume that

they will have testimony here of when they first heard of the accident.

In any event, they conducted an immediate investigation in the Toledo and Newport area, and in the course of that investigation, of course, they talked to the police [12] officer, they talked to everybody that they could, as I understand it, as the insurance companies normally do when they are investigating an automobile accident.

Thereafter they checked further with, I believe it was, Mr. McKinzie's neighbor, his landlady, obtained further information about him and continued their investigation until, oh, I believe it was more than a month later that they took a statement from Mr. McKinzie at the Veterans Hospital.

They entered into a release of his property damages with him, issued a check to the finance company and to Mr. McKinzie and they, of course, during that period of time continued to negotiate with Mr. Pihl who is representing the Gilmonts in this particular case, and no complaint had been filed at that time. I mention these facts because they are important in determining whether any reasonable delay occurred or whether the acts or conducts of the insurance company were such as to bar them from maintaining this particular proceedings.

But, during the course of the investigation quite early the first part of July, apparently, for some reason known to the insurance company, they felt that a further check should be made upon their insured, Mr. McKinzie. They at that time commenced writing letters to the Motor Vehicle Department to ob-

tain a record regarding his driver's license and any driving record that he might have. We have quite [13] a few letters. I believe they will be introduced in evidence. But, in any event letters went back and forth and it cost some dollars to obtain that report. For some reason the dollar was not sent and they did not acquire the report itself until September 3rd. On September 3rd they at that time apparently determined there was reason to—they felt that they might have grounds to rescind their obligation under the contract. They waited until September 23rd at which time they wrote a letter to Mr. McKinzie when he was in the Veterans Hospital. In that letter they advised him that they were rescinding coverage under the policy because they had discovered that at that time he took out the application that he did not have an Oregon driver's license. That was one ground.

The second ground was that they were entitled to rescind because Mr. McKinzie had been convicted of a traffic offense of no muffler. He did not have a muffler on in Corvallis, Oregon. Now, they continued. And because of those misrepresentations they thereby elected to rescind.

I differ a little bit with counsel as to the legal effect of these proceedings. I think it's a judicial determination of whether their rescission at that time was effective. And I believe myself that they are bound by the reasons that are set forth in their letter of rescission.

Now, shortly after this lawsuit was filed Mr. and [14] Mrs. McKinzie sometime, I believe, in Decem-

ber commenced an action to recover damages for the personal injuries, loss of wages, and the medical expenses that they sustained in Lincoln County, Oregon. That's where the accident occurred. The insurance company at that time entered into a defense of that case in Lincoln County and I believe they entered into some type of an agreement with Mr. McKinzie at that time as to whether they were or were no waiving any rights. And I assume that agreement will be in evidence.

That case in Lincoln County, of course, was just—nothing has happened. It's still pending, pending a determination of this case.

And I think the effect of this case is that—I mean, I think it is not an injury case to recover damages for personal injuries. What it is is that you ladies and gentlemen are to determine the facts as to whether the insurance company is or is not obligated to defend Mr. McKinzie under its insurance contract in connection with those damage cases which have been filed, or if a judgment is entered in those cases whether they are or are not obligated to pay any judgment up to the extent of the insurance provided in the policy.

Now, briefly it is our position in this case—I am afraid I said "briefly" about five times now—but briefly it is our position that the fact of the Oregon [15] driver's license, there is some confusion about it. I believe that the evidence will indicate that Mr. McKinzie was entitled to an Oregon driver's license at that time, although he had not actually obtained one. Also the evidence will show that he had a Cali-

ifornia driver's license at that time and that actually he was a resident of California.

The muffler charge, that would be just a question for you to determine whether that's such a material thing that would influence the company one way or the other in entering into an insurance contract. We don't believe that Mr. McKinzie was guilty of any fraudulent conduct at the time that he took out the insurance and that, of course, you will have to determine from the facts which are presented to you.

We further believe that the acts and the conduct of the insurance company extending from the month of June up until almost to October will indicate the intention by them to abide by their contract and that they are barred or, as the lawyers describe it, estopped from commencing these proceedings or for maintaining them.

We believe, particularly, that there was unreasonable delay after they had knowledge or after they should have known of the circumstances involving the driver's record. We believe that the evidence will indicate that they are obligated to defend their insured, Mr. McKinzie, if a judgment [16] is entered in those other cases.

We further believe they are obligated to pay the amount of the insurance that they contracted to pay. Thank you.

The Court: Plaintiff's first witness.

Mr. Bosch: Your Honor, before I call a witness I would like to have marked and offered in evidence some exhibits which might help as we go along.

The Court: The bailiff is attending another jury. So you may hand them to the clerk.

Mr. Bosch: Mark this Plaintiff's 1.

(At this point a Mayflower Applicant's Statement was marked for identification as Plaintiff's Exhibit 1.)

Mr. Bosch: Your Honor, there are certain of the exhibits which are part of the file, a deposition of the defendant, McKinzie, the original of it, and also the answer which originally was filed by the defendants Gilmont.

The Court: The original answer in this case?

Mr. Bosch: Yes, your Honor.

Mr. Kennedy: What are you offering, Mr. Bosch?

Mr. Bosch: Right now I am not offering anything. But I want to offer the answer of the defendants Gilmont.

Mr. Kennedy: Very well.

The Court: That was the answer in the state court or [17] here?

Mr. Bosch: Here, your Honor. There was an amended and supplemental answer, but I am interested in the original answer. That's Plaintiff's 3.

(At this point a true copy of insurance policy was marked for identification as Plaintiff's Exhibit 3.)

Mr. Bosch: Plaintiff's 7.

(At this point a State of Oregon Certificate was marked for identification as Plaintiff's Exhibit 7.)

The Court: How many exhibits do we have now?

Mr. Bosch: I beg your pardon, your Honor?

The Court: I was asking the clerk how many exhibits we have. You are offering the deposition of Arthur Allen McKinzie?

Mr. Bosch: Yes, your Honor.

The Court: As your exhibit?

Mr. Bosch: As defendants'.

The Court: You are offering it in your case in chief, are you not?

Mr. Bosch: Yes, we are.

The Court: It will have to be a plaintiff's exhibit. It isn't an exhibit. It's just identified and made a part of the record. The deposition of defendant McKinzie will be [18] marked for identification as Plaintiff's 20.

(At this point deposition of Defendant McKinzie was marked for identification as Plaintiff's Exhibit 20.)

The Court: It will be published and made a part of plaintiff's case in chief.

Mr. Kennedy: Is that being admitted, your Honor?

The Court: It isn't technically admitted. It's just made a part of the record. You may either read it into the evidence or it can be stipulated it would go—no. I think it should be read into the record.

Mr. Bosch: Now, at this time, your Honor, I would like to offer into evidence Plaintiff's Exhibit No. 1 which is the original copy of the application.

The Court: Any objection?

Mr. Kennedy: No objection.

The Court: It will be received.

(The Mayflower Applicant's Statement, having been previously marked for identification, was received in evidence as Plaintiff's Exhibit 1.)

Mr. Bosch: I would likewise offer into evidence the true copy of the policy of insurance which is Plaintiff's Exhibit No. 3.

The Court: Any objection? [19]

Mr. Kennedy: No objection.

The Court: It will be received.

(The true copy of insurance policy, having been previously marked for identification, was received in evidence as Plaintiff's Exhibit 3.)

Mr. Bosch: I would also like to offer into evidence the answer of the defendants Gilmont.

The Court: Do you have a number reserved for that?

Mr. Bosch: Well, I originally had No. 20 reserved, your Honor, but that was reassigned to Defendants' 1.

The Court: The answer will be marked Plaintiff's Exhibit 21.

(At this point a document entitled Answer was marked for identification as Plaintiff's Exhibit 21.)

Mr. Bosch: I thereafter offer what has been marked as Plaintiff's Exhibit 21, the original answer of the defendants Gilmont.

The Court: Any objection?

Mr. Kennedy: I object to that, your Honor, on the grounds there has been an amended and supplemental answer filed.

The Court: Well, I assume it's being offered as an admission. [20]

Mr. Bosch: It is, your Honor.

The Court: Well, let's withhold the offer of that until it's identified.

Mr. Bosch: I beg your pardon?

The Court: Let's withhold the offer or the ruling on it until it's identified by the party.

Mr. Bosch: All right, your Honor.

The Court: I assume you are going to call him. We will have to wait and see whether there is an adverse admission.

We have another deposition of Arthur Allen McKinzie in the file. Is that a copy?

Mr. Bosch: There was only one taken, your Honor. Perhaps you have got mine, the copy that I had in my file. It's been marked. That is not the one that I would prefer. I would prefer to have my own and mark the Court's copy as the exhibit.

The Court: Let the record show that there appears in the original file an envelope being sealed, endorsed "Deposition of Arthur Allen McKinzie Taken in behalf of Plaintiff March 6, 1958," before Niel C. Doane, Notary Public for Oregon. It bears the stamp of the Clerk of this Court under the date of April 1, 1958. The Clerk is directed to break the seal and remove the contents thereof and mark the contents Plaintiff's Exhibit for identification 20.

(At this point Deposition of Arthur Allen [21] McKinzie taken March 6, 1958, was marked for identification as Plaintiff's Exhibit 20.)

The Court: Is there any objection to the publication of this deposition?

Mr. Kennedy: Well, your Honor, Mr. McKinzie is not available here in the courtroom. He is in the Veterans Hospital. I assume that counsel, if he wants his testimony, could call him.

Mr. Bosch: If the Court please, we have not offered that in evidence yet. I ask it only be marked. I assume that's what the question was referring to.

Mr. Kennedy: There is no objection, then.

The Court: It will be published and made a record of the case.

Mr. Bosch: Plaintiff will call Mr. Carlson.

The Court: I think I had better interrupt here. We have a jury verdict waiting.

(At this point the trial of the present case was interrupted while another matter was heard.)

The Court: Plaintiff's first witness.

Mr. Bosch: Your Honor, I think it might be of help to the jury in considering what is going to follow here immediately if I would be permitted to read the application which we have offered. [22]

The Court: It's in evidence and you may read it in the record. I would like the record to show that any written exhibit introduced into evidence may be read by any party at any time during the course of the trial, with the one exception that on its initial reading it should be read in its entirety. Thereafter any party may refer to any portion of it.

Mr. Bosch: Yes, sir.

Ladies and Gentlemen: This is what has been

marked and which has been entered into evidence and will be referred to hereafter as the Plaintiff's Exhibit No. 1 and quite aptly so. This is what we start our case about.

This is the application that I referred to earlier that Mr. McKinzie signed on the 16th day of April in the company's southeast district office here in the City of Portland. According to the Court's ruling this entire application has to be read to you at this time. And I will start and please bear with me.

It starts off at the top, printed, Mayflower Insurance Exchange, Seattle, Washington. Declarations. Following that there are five boxes which have Type, State, District, Agent, and Territory. And then under each one of those are numbers 1, 2, 1, 1, and 1, respectively. Up at the top also it refers to this as the original. Below that it says Home office use only. [23]

Below that are some numbers which are CC 102-706. Then it refers to a policy number: 174380. That is the number which is assigned to this policy.

Then it goes on with DPC 40575109 AC 01 and it is crossed through. I don't know whether it's a zero, a 6, or a 2.

Then we come down to the more important parts. It says Name of Applicant: Arthur A. McKinzie. The next line is his residence and it is 4619 S. W. View Point Terrace, Portland, Oregon. Occupation: Welder. Policy period from 4-16-57 to 10-16-57—that is a six-month period—at 12:01 A.M., standard time at the address of the application stated herein.

In small type it says up above Except with re-

spect to bailment lease, conditional sale, mortgage or other encumbrance, the applicant is the sole owner of the automobile except as herein stated.

It proceeds to limits of liability which is printed, and A Bodily injury, which is printed and pencilled is completed the figure \$10,000 each person, \$20,000, each accident. That's what we refer to as a 10-20 policy.

Property damage is written in at \$5,000 each accident.

Following that information is a column headed Premium deposit. The one next to that is Initial fee. And [24] a column entitled Billing codes. And in those respective columns are the figures \$30.24, \$1.00, and a figure 1.

Underneath that is C & D—Fire and Theft, which is not filled in. Actual cash value not filled in. E—Comprehensive car damage (including Fire & Theft) Actual cash value. Premium deposit, \$5.40. Initial fee, 50 cents. And a billing code number assigned to this as 2.

Following that is F. Collision or Upset. Actual cash value less 50 Deductible. The premium deposit there is \$22.50. The initial fee, 50 cents. And again, the billing code number assigned, 2.

Following that is F-2. Towing and road service. That is blank.

G—Medical expense. And that is entirely blank. Other coverage. Entirely blank. Then all of these things that I have read are brought down and compiled. Accidental Death and Disability? (Use line above to indicate coverage), and all of these things

are totaled down here for a premium deposit totaling \$58.14 plus the initial fee of \$2.00. And under the column billing code the total premium would be \$60.14.

Then in the box to the right there is a description of the vehicle which reads as follows: Year: 1951. Cylinders: 8. Make: Cad. I assume that is for a Cadillac. The model is blank. The body type is Cpe. And I assume that's coupe. [25] Motor number is filled in as 516262287. Serial number is blank. The purchase date shows 4-16-57, the same day. New or used: And it is shown as used. And the purchase price is \$1390.00.

That brings us down to all the information relating to the amount of coverage, the description of the vehicle, and who we are talking about, where he lives and what his occupation is. How much it is going to cost him for the policy and what he expects to get for it—

Mr. Kennedy: If the Court please, I think counsel should just read the document rather than try to interpret it.

The Court: Yes. Just read the wording.

Mr. Bosch: Then it goes on, Any loss under Coverages C and D, E and F-1 is payable to the named insured and such persons as are named hereafter, if any, as their interest may appear: City Finance Co., 534 S.E. Morrison, Portland, Oregon.

And underneath that is a line. Underneath that line is written or printed, rather, Mortgagee name and address.

Then halfway down it proceeds to what is called

Applicants Statement in full capital letters in red ink. And it goes this way: 1. Have you or any driver of this car—(a) any physical impairment? The answer written in in ink is No. (b) had auto insurance cancelled or refused? No. [26] Had license revoked or suspended? No. Received any driving charges, citations or fines (not parking) in past 3 years? No. Been involved in any auto accident as a driver in past 3 years? No.

Question 2 is Name of previous insurer, and the answer to that is None. Question 3 is Name and address of employer and there is filled in the answer Page & Page Truck Equipment Co., Portland.

No. 4 is the vehicle is or is not—there is a choice,—and underlined is is not. So it reads The vehicle is not used in the duties of my present occupation.

5. The following are the only other drivers of this vehicle living in the household, and underneath that is None.

No. 6 asks How long have you known the agent, and there is filled in the word New.

7 is Did agent inspect vehicle? And there is filled in the word Yes.

8. Any unrepaired damage noted? No. I am single-or-married choice, and underlined is married.

10. My age is 40 and birthdate is left blank.

No. 11 is How many cars in the household, and the answer is One.

No. 12. If vehicle not garaged at above address, state where, and that is left blank. [27]

13 is How long living at present address, which is followed by 2 years. Then it goes on, less than a year previous address, and that's blank.

Then at the foot is this language which is printed:

“In consideration of the benefits to be derived therefrom the subscriber agrees with Mayflower Insurance Exchange and other subscribers thereto through Mayflower Underwriters, Inc., their attorney-in-fact, to exchange with all other subscribers policies of insurance or reinsurance in such form as may be specified by said attorney-in-fact and approved by the Board of Governors or its Executive Committee for any loss insured against, and subscriber appoints Mayflower Underwriters, Inc. to be attorney-in-fact for subscriber, with full power of substitution, granting it power in subscriber's name, place and stead to do all things which subscriber might or could do, severally or jointly, with reference to all policies issued, including cancellation, collection and receipt of monies due to the Exchange, disbursement of loss and expense payments to effect reinsurance, and perform all other acts incidental to the management of the Exchange and the business of inter-insurance; the maximum amount to be paid to Mayflower Underwriters, Inc. as compensation for its services shall be the membership fees and twenty-five per cent of all premiums. Said attorney is empowered to accept service of process on behalf of the [28] Exchange and to authorize insurance commissioner of any state to receive service of process in actions against

the Exchange upon contracts of inter-insurance. Reserves and general surplus remaining after payment of losses and expenses out of the remaining portion of premium received shall be invested and reinvested by the attorney-in-fact, subject to the approval as to such investments by the Board of Governors or its Executive Committee. Expenses payable from said remaining deposits and continuing premiums shall include all taxes, license fees, attorney's fees, adjustment expenses and charges, expenses of members' and Governors' meetings, agents' commissions, and such other specified fees, dues and expenses as may be authorized by the Board of Governors. All other expenses incurred in the conduct of the business and such of the above expenses as may be agreed upon between Mayflower Underwriters, Inc. and the Board of Governors or its Executive Committee, shall be borne by Mayflower Underwriters, Inc. The subscriber agrees to be liable severally for a contingent liability which shall not be more than a sum equal to one premium deposit, which contingent assessment liability shall apply only to actual losses and expenses incurred during the time that the policy of insurance shall have been in force.

“This agreement can be signed upon any number of counterparts with the same effect as though the signatures of all subscribers were upon the same instrument, and shall [29] be binding upon the parties severally and ratably as provided in the policies issued. The word ‘subscriber’ as used herein shall mean members of the Exchange, the subscriber

hereto, and all other subscribers to this or any other like agreement.”

Then in red ink follows: “I declare the facts within the applicants statement to be true and request the Exchange to issue the insurance in reliance thereon. I understand the insurance will in no event become effective prior to the time and date actually applied for, as indicated below.”

Then follows Applied for 6:00 P.M. and 4th month, 16th day of 1957. And on the top of the line under which the signature of applicant is the signature A. A. McKinzie. And at the foot in a stamp there is April 22, 1957.

On the back of this exhibit, Plaintiff's Exhibit No. 1, is entitled Agent's Statement and it says All questions on reverse side must be answered by the Applicant in full. Omissions will result in delay or declination of application. 1. The racial descent of the Applicant is, and it's filled in White. Does he speak English? Yes. 2. Source of application is blank. 3. Any member of the family have current Mayflower policy? It is written No. Then the name is blank and policy number is blank. 4. If rural address or general delivery, describe how to locate address. And that's blank. If truck, what is specific use? That's blank. [30] 6. Describe filings required, if any, and that's blank. 7. If Applicant answered Yes to any part of Section I or Section 8, explain below. Remarks: And that's blank. Then follows this: “I find the above statements to be correct to the best of my knowledge and I recommend this

subscriber." And it is signed George Bucholz, Agent.

Then follows what are called the District Agent's Report. Are all details in App. and Agent's Report complete? Yes. What is missing? And there is a check mark. When will it be sent in? And there is another check mark. Remarks are blank. State number is filled in as 2. The District number is 1. Agent's number is 1. The date is 4-17-57. Then appears this: "I have examined this application and recommend its acceptance," and the box is checked.

There is another statement that says "I have formally declined this application," and the box is blank.

Then again follows the signature of George Bucholz, and underneath that, District Agent's Signature.

Now, the prime purpose for reading all this or certain portions of it is not particularly relevant, but the part I think is relevant——

Mr. Kennedy: If the Court please, is counsel testifying? He is arguing the case.

Mr. Bosch: Now that I have satisfied the rule of the Court I would like to reiterate again the small portion called [31] the Applicants Statement.

The Court: You may.

Mr. Bosch: I will draw your attention once again, it says Have you or any driver of this car any physical impairment? No. Had auto insurance cancelled or refused? No. License revoked or suspended? No. Received any driving charges, citations or fines in past 3 years? No. Been involved in

any auto accident as a driver in past 3 years? No. Name of previous insurer? None.

Now, at this time, if it please the Court, I would like to read a certain portion of the defendant McKinzie's deposition for the purpose of showing that the statements which I have just read to the jury are not correctly represented.

The Court: Well, the only thing that I am concerned with now is that we don't take it out of context. I think that is pretty hard. How long is this deposition?

Mr. Bosch: I might say, your Honor, what I am particularly interested in now are the admissions against interest as they compare to the applicant's statement.

The Court: Well, from your copy can you give me page numbers?

Mr. Bosch: Primarily to make sense out of it to identify the deponent and for the same reason carry on through Page 2.

The Court: Well, I don't know what counsel's desire [32] would be about it. Does any counsel for the defendant have any objection to reading the answers while Mr. Bosch reads the questions?

Mr. Kennedy: Your Honor, Mr. McKinzie, I understand, is present in the City of Portland in the Veterans Hospital. And if he is going to be used as a witness I think he ought to be called. If the Court desires—if the Court considers it proper for this deposition to be read I believe it should be read in its entirety so it will not be taken out of context.

The Court: Well, I think this: I think this is properly a matter of rebuttal.

Mr. Bosch: Beg your pardon?

The Court: I think this is properly a matter of rebuttal.

Mr. Bosch: Well, your Honor, my purpose of offering it into evidence at this time is to show that the statements made by the applicant defendant, McKinzie, were not true. I expect——

The Court: Well, supposing he takes the stand and testifies the same way? You could only use it by way of impeachment.

Mr. Bosch: Well, I think I offered it, your Honor, on the ground of admissions against interest.

The Court: Well, you're premature on it.

Mr. Bosch: Beg your pardon?

The Court: You are premature. What is the rule providing [33] for use of discovery depositions? If the witness is available do you not have to call him if he is within the jurisdiction of the Court?

Mr. Bosch: Your Honor, I submit as authority for the admission of this deposition at this time two Ninth Circuit Court cases. I take that back. One Ninth Circuit Court case. The case of Autrey Brothers, Inc. vs. Chichester, which is found in 240 Fed (2d), 498. Just shortly quoting from that, the Court said it was immaterial whether or not the witness was able to testify or had testified in the action in which he was a party. Here we are offering the pertinent portions of a party's deposition, not a witness' deposition.

The Court: There is no doubt but what any dec-

laration against interest may be used against any party at any time. There is no doubt about that. Is that what you claim for this?

Mr. Bosch: Yes, your Honor.

The Court: Very well.

Mr. Kennedy: Your Honor, to simplify matters, I will withdraw our objection. I believe the deposition should be read in its entirety, though, because it should not be taken out of context by skipping from questions to answers.

The Court: Well, I can determine whether or not it is taken out of context. He is only offering what he claims to be admissions against interest and not offering the entire [34] testimony of the witness.

So, now, whether or not any part that he selects to read is taken out of context I will have to determine that when it is selected.

Now, it is a matter of getting someone to read the answers.

Mr. Bosch: May I suggest, perhaps, Mr. Vosburg could take the part of the deponent and borrow the original?

The Court: Very well.

Mr. Bosch: Or the Court's copy. If the Court please, I appreciate there are certain questions at the beginning that are not admissions against interest.

The Court: I understand. But I think it would be well to identify him.

Mr. Bosch: If I could more or less——

Mr. Kennedy: Why don't you read the whole deposition?

Mr. Bosch: On Page 3, Mr. Vosburg.

(At this point Mr. Vosburg took the witness stand to read the answers as given by the deponent in the deposition and Mr. Bosch in the present case presented the questions asked in the deposition.)

Mr. Bosch: This starts out as direct examination and I am asking the questions of a man named Mr. McKinzie who Mr. Vosburg is taking the part of. I start out by saying: [35]

DEPOSITION OF ART ALLEN MCKINZIE

"Your name is Art Allen McKinzie?

A. Correct.

Q. Are you also known sometimes as Arthur A.?

A. Never.

Q. Do you ever sign as Arthur A.?

A. Never.

Q. Ever sign as A. A. McKinzie?

A. Oh, yes.

Q. And Art A. McKinzie?

A. Yes. Never as Arthur.

Q. So your name is Art, it is not a short for Arthur?
A. Uh-huh.

Q. How old are you, Mr. McKinzie?

A. Forty-one.

Q. Where were you born?

A. Portland, Oregon.

Q. How long have you lived in Portland?

(Deposition of Art Allen McKinzie.)

A. Oh, I left here when I was about nine years old.

I was actually raised in Los Angeles.”

Mr. Bosch: Your Honor, trying to keep myself within the limits of the Court’s ruling, there are, I appreciate—if I take it out of context—I have got to make some explanation of the context as I come up to these questions because I have skipped a considerable amount. But to make some sense I would like to make some comment, if I may. You might—— [36]

Mr. Kennedy: I object to any comments being made, your Honor. And I——

The Court: Well, I don’t know what his comments are.

Mr. Kennedy: Well——

The Court: I might object to your comments.

Mr. Bosch: I direct your attention, Mr. Vosburg, to Page 8. And I am referring to a question half-way down the middle of the page, and I am asking the deponent, Mr. McKinzie, to give us the exact words that he used as he came in to make his application. And my question——

The Court: Just read the question.

Mr. Bosch: My question is this:

“Q. Now, can you tell us, and use as best you can the exact words, what you told him when you first came in.

A. Sam had already called on the telephone, he was expecting me, so he made out the insurance papers.

(Deposition of Art Allen McKinzie.)

Q. Did you tell him who you were, give him your name? A. Yes.

Q. And then tell him that you wanted insurance on this car? A. That's right."

Mr. Bosch: Now referring to Page 9, Mr. Vosburg—and this, your Honor, is after the deponent had in his hand a copy of the application. I had handed him a copy of the [37] application and we were questioning him as it goes on:

"I am going to hand you what Mr. Doane has marked as Plaintiff's Exhibit No. 1.

A. He filled this out himself.

Q. Now, let me ask you first if that is your signature down in the right-hand corner.

A. That is my signature, I didn't notice that 'Arthur'. He just filled in 'Arthur' because he figured Art was short for Arthur.

A lot of people take it that way, probably the same as you did and other people.

Q. On that piece of paper that you have there which has been marked as Plaintiff's Exhibit 1, is there any handwriting on that exhibit which is yours other than the signature which you have identified? A. No.

Q. In other words, all but the signature on that application——

A. That is the only thing that was made by me is my signature.

Q. Let me finish my question. All of the writing that is on that application was made by this agent for Mayflower except for your signature?

(Deposition of Art Allen McKinzie.)

A. That's right.

Q. Is that correct? [38] A. That is correct.

Q. Now, when you came in there did he ask you what your name was? A. Yes, uh-huh.

Q. And your address? A. Yes.

Q. What kind of a car it was? A. Uh-huh.

Q. And how much coverage you wanted?

A. Well, he had already known what the car was and Sam had already evidently told him.

Q. Is the information on that application, is it correct as to the kind of a car you were insuring?

A. That's right.

Q. And your address? A. That's right.

Q. And there is a mistake on your name?

A. That's right. It is 'Arthur A.' up here, it should be 'Art A.'

Q. All right.

A. But that is the only signature on there that is mine, any other writing on there isn't mine.

Q. Now, is the date approximately correct that is on it, as far as you remember?

A. 6/19—I believe so. [39]

Q. And was the time which is down in the lower left-hand corner, 6:00 p.m., is that correct?

A. That's right, I said it was about 6:00.

Q. Now, I want you to look at that and tell me if there is anything on there that is not correct.

A. My name at the top for one.

Q. Anything else?

Mr. Kennedy: Give him an opportunity to examine the whole document.

(Deposition of Art Allen McKinzie.)

Mr. Bosch: All right.

The Witness: There is only one on there, it says, 'License suspended or revoked.' My license was never actually revoked or suspended because I never had a license here at the time you are referring to. That was a 'No muffler' citation. I had never applied for an Oregon driver's license up to that time then. I was driving with a California driver's license. I just came from California. So technically I never had a license to be revoked or suspended.

Q. All right, let me ask you this: At the time that this application was signed, did the agent or the person that took your application, did he give you a copy of it? A. Yes, I believe he did.

Q. Do you still have that copy? [40]

A. I think it is at home, hu-huh.

Q. Do you remember how much money that you paid to the agent at the time?

A. I can't recall right offhand. It should be on here shouldn't it?

Q. If I told you it was \$20, would that be about right? A. I don't recall now.

Q. Did you pay some money?

A. Yes, uh-huh.

Q. Did he give you a receipt?

A. I was supposed to pay so much a month.

Q. Did he give you a receipt for the amount of money that you did pay? A. Yes.

Q. Now, directing your attention on this Plaintiff's Exhibit No. 1 to the portion about the middle

(Deposition of Art Allen McKinzie.)

of the page which is entitled, 'Applicant's Statement,' and under that item (1), would you read out loud the questions under that item and the answers that you gave?

Mr. Kennedy: I object to it, the document speaks for itself.

Mr. Bosch: All right.

Q. At the time this application was taken over in Mayflower's office, had you had a license revoked or suspended? [41]

A. Technically yes and technically no.

Q. Well, give us technically yes why.

A. Well, that is kind of a silly question.

Mr. Kennedy: Let him answer the question.

The Witness: Because actually I didn't feel that I had any right to have my license revoked or suspended on a lousy charge for no muffler on a truck and I had no Oregon driver's license at the time to be revoked or suspended.

Q. Had you ever had an Oregon driver's license?

A. Years before.

Q. About when did you take it out?

A. It was—I don't know. It ran out in '50 or '51.

Q. Where did it run out?

A. Because I was in California, I didn't need it here.

That is a good question.

Q. You think that you first got your Oregon driver's license in what year?

A. '49. Well, let's see. No, the first time I ever

(Deposition of Art Allen McKinzie.)

had an Oregon driver's license was in '46 or '47, pardon me; I will say it was '47 the first license I ever had in Oregon.

Q. Had you ever had a driver's license before that?

A. Oh, yes, in California, but never here.

Q. So, the first Oregon driver's license you had was [42] in 1947? A. The first one.

Q. Did that ever expire?

A. Yes, and I got one in '49, I think was the next one.

Q. Why did the one in '47 expire?

A. For the one thing I was out of this country again.

Q. In other words, you didn't—

A. I went to Guam for a year; that is in the Marianas, for a year, and after that I came back to California for a while and then I came back up here and I was married in '49 in Dallas."

Mr. Bosch: Now, at this stage, your Honor, I handed to the witness what we referred to in that deposition as Exhibit No. 2 and it was an abstract of his driving record.

"Q. Mr. McKinzie, I am going to hand you what has been marked for identification as Plaintiff's Deposition Exhibit No. 2.

I want you to look at that.

A. You are referring about another accident, I imagine.

Q. No, I just want to get the driving record straightened out.

(Deposition of Art Allen McKinzie.)

A. Now, this was——

Mr. Kennedy: Just a minute, let him ask you the question. [43]

Q. (By Mr. Bosch): Have you read Exhibit 2?

A. I am reading it now.

Q. Let me know when you finish reading.

A. That accident in '47——

Q. Just a minute, have you finished reading it?

A. Yes.

Q. The whole thing?

A. No, I haven't read the whole thing.

Q. You read the whole thing and let me know when you are finished.

A. I never knew there was one suspension.

Q. Are you all finished reading it?

A. Yes, uh-huh, but this is not correct.

Q. All right.

Now, may I see it a moment. This report reflects that you were issued a license on January 4, 1951.

Mr. Kennedy: I object to that.

Mr. Bosch: Is that correct?

Mr. Kennedy: Just a moment, I object to the question on the grounds that he is being asked questions or impeached from a document that has not been properly identified as a true and correct copy of anything and he has also stated that it was not a correct copy.

Mr. Bosch: We will find out whether it is correct [44] or not.

(Deposition of Art Allen McKinzie.)

Q. Do you recall whether you got an Oregon driver's license on or about January 4, 1951?

A. No, I didn't.

Q. Were you in Oregon at that time?

A. In 1951 I was in Los Angeles.

Q. Well, when did you return to Oregon?

A. I left here in '52. I came up here and worked on the Detroit Dam job and after the dam job I left and went back to L. A.

Q. Well, did you have an Oregon driver's license in 1947?

A. No, I didn't have an Oregon driver's license in 1947. I had just come up here from California and had a California driver's license in 1947. After that accident I was issued a license.

Q. After what accident?

A. After that first little accident there where a guy hit me smack in the middle.

Q. Which one, what date?

A. 1947; that part there is correct. That was my cousin's car. I had a California driver's license at the time and it was never suspended.

Q. Your California license wasn't?

A. No. After that I was issued an Oregon driver's [45] license and a chauffeur's license because I was driving for Armour Company.

Q. Do you remember what year that was?

A. 1947.

Q. And that was after this accident?

A. After the accident, and I was never notified that I was ever suspended in 1947.

(Deposition of Art Allen McKinzie.)

Q. Well, let's try it this way: You have read this—

A. Part of it I read, yes, I have read it.

Q. —this Exhibit 2? A. That's right.

Q. Will you tell us what part of this Exhibit 2 is incorrect?

Mr. Kennedy: Just a moment, I am going to object to the introduction of that exhibit until it is properly identified, and I object to any further questions on the exhibit until it has been properly introduced.

Q. (By Mr. Bosch): Do you understand what that exhibit is? A. Yes.

Q. Will you tell us what part of it is incorrect?

A. 1947, June the 4th, 1947, I was never suspended. I was driving for Armour & Company at that time.

Q. Is there any other part of it that is incorrect?

Mr. Kennedy: I would like the record to show a [46] continuing objection to any question pertaining to that particular document being marked as Plaintiff's Exhibit 2.

The Witness: Yes, the judgment evidently was awarded against me.

Q. (By Mr. Bosch): Was that part correct?

A. But, I did have insurance through Heider and Heider has never paid it.

Q. As far as that document is concerned, is it incorrect in any other respect than the one that you previously stated?

(Deposition of Art Allen McKinzie.)

A. Traffic offense—isn't that silly. Yes, that is correct except that 1947. But I had no driver's license here when I had that accident.

Q. Which accident?

A. I mean this, 'No muffler' citation.

Q. You had no license?

A. I had no Oregon driver's license, I had a California driver's license. I just came up from California.

Q. You are referring to this?

A. 'No muffler.'

Q. That was February 14th, 1946, is that correct?

A. That is correct.

Q. At that time you had no Oregon driver's license?

A. That is correct, I had just come up, I wasn't even [47] a resident of Oregon yet. I hadn't decided whether we would stay or not.

Q. But prior to that time and according to this, and correct me if I am not stating it right, you did have your driver's license, your Oregon driver's license suspended for the nonpayment of that judgment?

A. I was never notified of that either because I wasn't here. I was in California. I was never notified of that.

Mr. Kennedy: So you don't know?

The Witness: So I don't know. I never received anything saying that I was suspended.

Q. (By Mr. Bosch): So you don't know whether this is correct or not?

(Deposition of Art Allen McKinzie.)

A. I can't say it is, because I never received any notice at all that I was suspended at that time.

Q. Now, do you have an Oregon driver's license now? A. No.

Q. Have you ever made application for one?

A. I did.

Q. When? A. After that.

Q. When?

A. After that 'no muffler' charge.

Q. What was the effect of that?

A. Suspension for a year. [48]

Q. When did you make application, about when?

A. February, after this 'no muffler' charge.

Q. Of 1956? A. 1956, correct.

Q. And they said they would—

A. The State suspended my license for a year and I thought it was a real bum rap.

Q. Do I understand you correctly now, after your muffler citation sometime in February of 1956 you made an application to the State of Oregon for a driver's license? A. That is correct.

Q. And they then advised you your driving permit or license in the State of Oregon will be suspended? A. For one year.

Q. For one year, from approximately February 1956 to February 1957? A. That is correct.

Q. Now, did you ever get a driver's license from the State of Oregon? A. Not after that, no.

Q. Did you get one in approximately February of 1957?

(Deposition of Art Allen McKinzie.)

A. Close to it. I got a permit, but I was never issued a license.

Q. What kind of a permit?

A. Well, it was just a permit—it wasn't a [49] permit—it was a—that I applied for my license.

Q. I see. But you never did get an Oregon driver's license?

A. I had never received it in the mail, no.

Q. Well, would it be correct to say that you still don't have an Oregon driver's license?

A. That's right.

Q. And you haven't had one since when?

A. '51 or something like that. I think it run out about '51, the last one.'

Mr. Bosch: Now, this question at the foot of the page: "But in the year prior to the time that"—

Mr. Kennedy: Just a moment! Are you skipping?

Mr. Bosch: Yes.

Mr. Kennedy: Where are you skipping to?

Mr. Bosch: The last question at the foot of Page 21. I will read the whole thing. Do you want me to read it?

Mr. Kennedy: Yes.

Mr. Bosch: Is that all right, your Honor?

"Q. Now, going back to this application which was taken April 16th, 1957—

A. I was eligible for a license then.

Q. Have you received a license?

A. No, I never even applied for one. For one thing, I had been to Los Angeles working and I

(Deposition of Art Allen McKinzie.)

had been clear [50] to Salt Lake City driving and I was using my California driver's license; it was still good.

Q. At the time you made the application on April 16th, when you made your application to Mayflower, you still had your California driver's license?

A. Yes, I still had my California driver's license.

Q. And that was still in full force and effect?

A. Yes, that's right.

Q. But in the year prior to the time that you made this application to Mayflower for this insurance, and that was on April 16th, 1957, you did have your Oregon driver's license suspended, didn't you?

A. In February——

Q. Of '56?

A. I had no Oregon driver's license to be suspended actually. I never received one.

Q. You made application in February of 1956?

A. That is correct.

Q. They advised you they would suspend the issuance of a license for one year?

A. For one year for the 'no muffler' charge.

Q. All right. But at the time you had the 'no muffler' charge, you didn't have a driver's license, Oregon driver's license?

A. No, it was a California one. I didn't even have a [51] residence here. I was staying with my mother-in-law.

Q. Well, would it be correct to say that you had

(Deposition of Art Allen McKinzie.)

had your license suspended prior to the time that you made this application?

A. A year before, yes, but I was eligible for a license then.

Q. I appreciate that, but would it be correct to say that you had——

A. I hadn't applied, if that is what you imply, I hadn't applied, when I bought this car, if that is what you mean.

Q. But, you had applied for one in February of '56?

A. That is correct.

Q. And they advised you that it would be suspended for a year?

A. That I would be eligible next February, '57.

Q. So there was a suspension of a license, is that correct?

A. No license to suspend. Actually I never received a license.

Q. Now, were there any driving charge, citations or fines in the three years prior to the time you made this application?

A. Here in Oregon?

Q. Any place. [52]

A. Well, I might have had some tickets in Los Angeles, if that is what you mean.

Q. What would they be for?

A. For motorcycles. I used to drag race once in a while.

Q. What would be the citation? Would it be for overtime parking?

A. No, drag racing.

Q. For speeding?

(Deposition of Art Allen McKinzie.)

A. Drag racing. Just drag it from a signal, a motorcycle.

Q. Would that be within three years prior to the time you made application for this insurance?

A. It could be.

Q. Well, let's put it down to states.

A. A motorcycle is a little different than an automobile.

Q. I appreciate that. In the State of Oregon in the three years prior——

A. No tickets at all.

Q. What about this 'no muffler' charge?

A. Well, that is the only one.

Q. Other than the 'no muffler'?

A. There was no fine even connected with that. The fact, the judge was mad the State had suspended my license or, hadn't suspended my license, but the judge was real [53] mad, he figured it was up to him to do the suspension instead of the State. So he wouldn't even fine me.

Q. All right. But there was a traffic violation in Oregon? A. That is the only one.

Q. Within three years, and that was the 'no muffler'? A. Yes.

Q. And that was down in Corvallis?

A. That's right.

Q. Other than that, there was none within three years? A. That's right.

Q. How about the State of California, within three years of April 16, 1957?

A. I told you the drag racing.

(Deposition of Art Allen McKinzie.)

Q. Any others? A. That is all.

Q. Will you tell us again what drag racing means?

A. Motorcycles, a whole line of motorcycles dragging out.

Q. You mean see who could get 'out first?

A. That's right. About six of us, and each one of us got a ticket.

Q. Do you know where that occurred?

A. City of Bell.

Q. And that only happened once? [54]

A. That is correct.

Q. Well, when you made this application, why didn't you tell the man that took it about that one?

A. They didn't ask me if I ever had any tickets for any speeding or anything.

Q. Did you understand what charges, citations meant?

Let me ask you this: Were you fined as a result of this? A. Yes, I was fined.

Q. Do you understand what a fine is?

A. Sure I understand.

Q. Well, your answer on this application there indicates you had no fine."

Mr. Kennedy: And I objected at that point on the grounds it was argumentative.

The Court: Yes, it is.

Mr. Bosch: "Do I understand you now, in the three years prior to the time that you made this application on April 16th, 1957, that you had only had—— A. One ticket.

(Deposition of Art Allen McKinzie.)

Q. You had one ticket and that was where?

A. Actually one ticket.

Q. Where was that?

A. I was never fined for the 'no muffler' charge.

Q. All right. Where was that? [55]

A. That was the City of Bell, California.

Q. Did you pay a fine there? A. I did.

Q. All right. On the 'no muffler' charge did you plead guilty to it?

A. Oh, yes, naturally I was guilty.

Q. But you didn't pay a fine?

A. But I didn't even have to appear, my brother-in-law appeared because it was his car. All he had to do was show that it was repaired.

Q. Are you sure now that those are the only two violations, citations or fines that you had any place, California, Oregon, or any other state?

A. That is correct.

Q. Then referring your attention back to Plaintiff's Exhibit 1 and under—

A. You are asking me for my life's history.

Q. —and under the portion entitled 'Applicant's Statement,' is the answer to question 1-D correct or incorrect?

A. 1-D. Citation—well, it wouldn't be correct, would it?

Mr. Kennedy: Are you talking about 1-D?

Mr. Bosch: 'D' as in dog.

The Witness: 'D' as in dog. [56]

Q. (By Mr. Bosch): Is the answer to 1-E correct?

(Deposition of Art Allen McKinzie.)

A. I want you to note that none of this is my handwriting on here.

Q. I appreciate that. A. '1' what?

Q. 1-E as in easy?

A. That is correct there other than—let's see—that would be correct.

Q. Your answer to 1-E is correct?

A. Right.

Q. Is the answer to 1-B as in boy, correct?

A. No, that wouldn't be correct, would it?

Q. I don't know.

A. Let's see, wait a minute. No, that is right.

Q. That is correct?

A. That is correct. I have never been refused insurance or—read out the whole statement, why don't you?

Q. Well, it says, 'Have you or any driver of this car had auto insurance cancelled or refused.'

A. No.

Q. So that answer is correct?

A. That is correct.

Q. All right. Now, directing your attention to question 2, under the same applicant's statement—

A. Uh-huh. [57]

Q. 2, I didn't put that down. Is that correct?

A. No, because I don't recall the insurance companies that I have done business with.

Q. Well, do I understand you that—

A. I hadn't had any insurance for quite a while then.

Q. Do I understand you, then, that the answer

(Deposition of Art Allen McKinzie.)

to number 2 was given as, 'None,' because you didn't recall the names of the companies?

A. That's right, I don't carry all of this stuff around in my pockets.

Q. But you did have previous insurance?

A. Yes, I bought several different cars on time, naturally I was insured.

Q. Can you recall now the names of any companies? A. Can I recall what?

Q. Can you recall now the names of any companies? A. No, I can't.

Q. Were any of the companies—did you take any of the insurance in these companies out in Oregon? A. That's right.

Q. How many?

A. Through Otto Heider. He is insured in Oregon, the insurance company that I was through.

Q. Did you only do that once with Mr. Heider?

A. No, I had two different policies through him that [58] I know of.

Q. Were they taken out different times?

A. Yes, two different cars.

Q. But other than your insurance that was written with Mr. Heider, was there any other insurance taken out in the State of Oregon? A. No.

Q. How about the State of California?

A. Yes, when I had a motorcycle, but I don't recall the insurance company.

Q. Well, was there more than one?

A. More than one what?

Q. More than one company?

(Deposition of Art Allen McKinzie.)

A. No, just one company.

Q. It was always the same company with your motorcycle? A. That's right.

Q. Did you ever have an insurance policy on an automobile in California?

A. If I did it has been so many years ago that I don't recall the names. I bought several different cars and I had insurance for them all, not liability insurance, I had deductible, fifty dollars, twenty-five dollar deductible, whatever it was.

Q. Did you ever have any liability insurance at any time prior to the time you made this application with [59] Mayflower? A. Yes."

Mr. Bosch: Your Honor, I don't claim anything for the next page and a half or two pages. But if counsel wishes I will read it on through.

Mr. Kennedy: I think the whole deposition should be read.

The Court: It's not necessary to read the whole deposition. I will hear you if you are of the opinion that something has been taken out of context. This offer was purely for admissions against interest.

Mr. Kennedy: It's impossible to follow it that closely. It's difficult to tell whether it's out of context when all the testimony isn't read.

The Court: It seemed to me they are correct questions and answers, unless you can show me something. I don't see anything out of context.

Mr. Bosch: If counsel has no objection I would

(Deposition of Art Allen McKinzie.)

like to move over to Page 32 about the middle of the page:

“Q. Would it be correct to say that your answer to number 2 under your ‘Applicant’s statement’ is not correct, is that right? A. That’s right.

Q. It is not correct?

A. He wrote it in there himself, the agent did.

Q. Well, where did he get the information?

A. Probably from me, I don’t have any insurance policies in my pocket.

Q. Did he get all of this information from you?

A. Evidently, I was the only one there.”

Mr. Bosch: Now, I would like to move over to the middle of Page 33.

The Court: All right.

Mr. Bosch: “Q. After he took the application and your money, did he give you a receipt for the money? A. Oh, yes.

Q. And a copy of the application?

A. That’s right.

Q. Sometime after that did you get the policy?

A. That’s right.

Q. Do you still have the policy?

A. That is correct.

Q. You still have the application?

A. That is correct.

Q. Do you still have the receipt?

A. That is correct.”

Mr. Bosch: Now, I would like to move over to the cross examination by Mr. Kennedy on Page 39.

(Deposition of Art Allen McKinzie.)

The Court: Now, you are still contending that this is an acknowledgment against interest? [61]

Mr. Bosch: Yes, your Honor. This will appear just above the middle of the page.

“Q. About 6:00 p.m. Did he ask you any of these questions on the applicant’s statement or did he just fill them out? A. He asked me.

Q. He asked you some questions.”

Mr. Bosch: These, incidentally, are questions put by Mr. Kennedy on cross examination.

“Q. He asked you some questions. Did he ask you all of the questions that are on this applicant’s statement? A. I think he did, yes.

Q. He asked you every one of those questions?

A. That’s right.”

Page 41. This is still Mr. Kennedy interrogating. There appears up towards the top:

“Q. Did he ask you if your license had been suspended? A. Evidently he did.

Q. Do you remember that definitely or not, or can you remember?

A. I think he must have.

Q. You think he must have?

A. Uh-huh. He read all of the answers off there and I just said, no, no, no.”

That’s all I offer it for. [62]

The Court: You may step down, sir.

Members of the jury, take a ten-minute recess.

(Recess taken.)

Mr. Kennedy: I would like to read the cross

(Deposition of Art Allen McKinzie.)
examination to explain some of these previous answers.

The Court: All right. If you claim it is out of context you may.

Mr. Vosburg: Do you want me?

Mr. Kennedy: Please.

(At this point Mr. Vosburg took the witness stand to read the answers as given by the witness in the deposition while Mr. Kennedy presented the questions as were presented in the deposition.)

Mr. Bosch: Do I understand, your Honor, this is being read on the basis that it is out of context?

The Court: That's what I assume.

Mr. Kennedy: No——

The Court: All right. That would be part of your case in chief.

Mr. Kennedy: I am going to read some answers—parts of the deposition that explain some of the answers.

The Court: That will be in your case in chief.

Mr. Kennedy: Very well. [63]

Mr. Bosch: At this time, your Honor——

The Court: Well, now, let's see. If the witness was here and upon interrogation gave those same answers by way of cross examination he could bring out an explanation. I think you may proceed, Mr. Kennedy.

Mr. Kennedy: Thank you, your Honor. Commencing at Page 38, Mr. Vosburg, and Mr. Bosch. This is my cross examination:

(Deposition of Art Allen McKinzie.)

“Q. Mr. McKinzie, if I understand you correctly, at the time of the accident you had a California driver’s license? A. Right.

Q. And at the time you took out the insurance with Mayflower Insurance Exchange you had a California driver’s license, is that correct?

A. That is correct.

Q. At the time you bought this car, as I understand it, this fellow at Sam’s Auto Mart referred you to—— A. Sam himself.

Q. Do you remember his last name?

A. I don’t recall his last name.

Q. Is it Dardano? A. That’s right.

Q. What did he tell you about?

A. I think it is an Italian. [64]

Q. What did he tell you?

A. He told me the agent to go to and called on the ’phone and made prior arrangements for me to go down there.

Q. Do you know what he told him on the ’phone?

A. I don’t recall now, no.

Q. You went from there down to City Finance?

A. Correct.

Q. How did you happen to go to City Finance?

A. Through Sam.

Q. He told you to go to City Finance, too?

A. Yes. He did all of the arranging of the financing who it would be through.

Q. So you arrived at this agent’s office, it was pretty late, is that right?

A. That’s right, 6:00 p.m.”

(Deposition of Art Allen McKinzie.)

Now, Mr. Vosburg and Mr. Bosch, I am skipping down to the one, two, three questions and answers which have already been read.

“Q. Now, I am a little bit confused about when you moved up here from California. When did you first go to California, say, after 1947?”

A. '52. Well, I was down there in '51, came back and worked on the dam and went back in '52.

Q. Back in California in '52? A. Yes. [65]

Q. Then when did you come back to Oregon?

A. In '56, first part of '56.

Q. And then you stayed here since that time?

A. Uh-huh, but we didn't intend staying here at the time we came up.

Q. It was a temporary visit? A. Uh-huh.

Q. You planned to go back to California?

A. We planned going back, yes.

Q. Now, do you recall specifically that the insurance agent gave you a copy of this application?

A. I don't remember whether he did or not now.

Q. Do you have a copy of this application?

A. I don't know if I do or not, I will have to look at my papers at home. I have them all at home, my wife has them.

Q. I take it you are not sure whether he gave you a copy or not, is that right?

A. I don't recall if he gave me a copy exactly like that or not, but I think I have one, though.

Q. And I believe you testified it took about ten minutes to fill out the application?

A. That's right.

(Deposition of Art Allen McKinzie.)

Q. Could it have been less than ten minutes?

A. No, I think it was ten minutes, I think. [66]

Q. Did he look at your car, the agent?

A. He didn't come out and look at it, no, the agent didn't. He saw me drive by, he never came outside and examined the car at all.

Q. Did you tell him you had a California driver's license? A. No, he never asked me.

Q. He never asked you?

A. He never asked me if I had any license at all."

Now, skipping the next question and answer which has already been read—well, it goes down one, two, three, four, which have already been read.

"Q. If you received a copy of the application, where would it be now? A. At my wife's.

Q. Did you receive the insurance policy itself?

A. Yes, I have the policy.

Q. Did City Finance receive a policy, do you know?

A. I imagine they did, I had \$50 deductible and, of course, they wouldn't have anything to do with the liability insurance policy. All they were interested in was the \$50 deductible.

Q. Did you have any conversation with the agent as to whether you were taking out \$5,000, \$10,000 liability [67] insurance or \$10,000-\$20,000 liability insurance?

A. Well, I was led to understand it was good at \$20,000.

(Deposition of Art Allen McKinzie.)

Q. Did you talk to him about that, the difference in rates and things like that?

A. No, we didn't discuss that much."

Mr. Bosch then said, "I didn't understand the answer."

Mr. Vosburg: Do you want me—"We didn't"—do you want me to continue?

Mr. Kennedy: Yes.

Mr. Vosburg: "A. We didn't discuss that, I don't recall. What I wanted was some kind of liability for the car, so he just wrote it up.

Q. Did you make any report of this accident of June 8th, 1957, to the State?

A. I haven't even got out of the hospital. I made a report but they never made—sent any papers.

Q. Do you know if anybody made any report on your behalf? A. I don't think so.

Q. Did you report this accident to Mayflower or have someone report it for you?

A. Evidently the doctors down there must have reported for me, because I had insurance card in my wallet and [68] I was out of my head for two weeks so they evidently must have reported it.

Q. That is in Newport, you are talking about?

A. Yes.

Q. You were first in a Newport hospital, is that right? A. Yes, down at Newport.

Q. When did you say the insurance adjuster from Mayflower Insurance Exchange first contacted you? A. The exact date?

(Deposition of Art Allen McKinzie.)

Q. Well, as best you can remember.

A. Came up here to the hospital to see me?

Q. Yes.

A. It must have been in August, around the first part of August, close to around in there.

Q. Was that the first time he talked to you?

A. That is correct, he got a statement from me. And the next—City Finance man came up with a check.

Q. Did he take a statement from you at the time? A. The adjuster?

Q. The adjuster.

A. Yes, he asked me how the accident happened.”

Mr. Bosch: If the Court please——

The Court: Yes.

Mr. Bosch: ——what goes from here is not relative to these representations. It refers to the adjusting in the [69] remarks that were made after the accident. It doesn't go——

The Court: Do you contend it applies to what was read?

Mr. Kennedy: I think it's proper cross examination, your Honor.

The Court: Only to the extent of what was examined by the plaintiff. Now, I realize your position has been throughout this proceeding that the whole deposition should be offered.

Mr. Kennedy: That's right.

The Court: Now, either party has the right to offer it upon the condition being met to comply

(Deposition of Art Allen McKinzie.)

with the rule. But, bear in mind, the party reading this had offered it only for the single purpose of claimed statements by a party against his interest. That's all that you have the right to cross examine on.

Where did you leave off?

Mr. Vosburg: He asked me the question about the adjuster—about the adjuster. (Indicating) That one.

The Court: I see.

Mr. Bosch: Your Honor, I think we enter into the matter again beginning on Page 45.

The Court: Beginning on Page 45, yes. I believe that you may start with the first question on top of Page 45.

Mr. Kennedy: Thank you, your Honor.

The Court: Then continue through to the question in [70] the middle of the Page 46: "Did you have any discussion * * *"

Mr. Kennedy: Thank you.

"Q. Now, you testified that you had some type of a permit or receipt or an application for an Oregon driver's license, I believe back in 1956, is that correct? Do you understand my question?

A. In '56, that is when I made application.

Q. Did you receive some type of permit?

A. Well, yes, I had a driver's permit up until I received my license. And I never received my license.

Q. You applied for your license at some place with the State, is that right? A. That's right.

(Deposition of Art Allen McKinzie.)

Q. And they issued you——

A. A driving permit.

Q. Was it a temporary driver's permit?

A. A temporary driver's permit until you receive the driver's license.

Q. Until you receive your formal driver's license from the State? A. That's right.

Q. You did receive that?

A. I didn't receive the driver's license.

Q. But you received your permit?

The permit, yes, permit. [71]

Q. But you never received the driver's license itself? A. No.

Q. Now, this charge of 'no muffler' in Corvallis, did that involve your brother's truck?

A. Yes, uh-huh, my wife's brother's.

Q. Your wife's brother's? A. Yes.

Q. He didn't have a muffler on his truck?

A. The muffler fell off in the woods, uh-huh.

Q. But you were driving the truck at that time?

A. That is correct. He was sick that day and so he asked me to take a load in for him. He had a loan on his truck and I took it into Corvallis to the feeder plant there."

Excuse me, your Honor. I don't know whether the Court's ruling included the next question or whether I should stop here.

The Court: I will have to look at it. I thought we got into those objections. Yes. I think that you are going afield commencing with the question: "Did you have any discussion * * *"—

Mr. Kennedy: All right.

The Court: —as to the balance of your cross examination.

Mr. Kennedy: That's all. Thank you very much, Mr. Vosburg. [72]

The Court: I believe I will give that to the Clerk.

Mr. Bosch: Your Honor, at this time I would like to offer into evidence what has previously been marked for identification as Plaintiff's Exhibit No. 7 and Plaintiff's Exhibit 19 which are, respectively, the reports from Oregon and California.

The Court: Any objection to 7?

Mr. Kennedy: Is 7 the Oregon, your Honor?

The Court: Certified copy of Motor Vehicle Driving Record of Oregon.

Mr. Kennedy: No, no objection.

The Court: It will be received.

(The State of Oregon Certificate, having been previously marked for identification, was received in evidence as Plaintiff's Exhibit 7.)

The Court: The next one was 14?

Mr. Bosch: 19.

The Court: 19. 19-A through G. 19-A through 19-G, both inclusive, appear to be abstracts of driving records of defendant from California.

Mr. Kennedy: May I examine that, your Honor?

The Court: Yes, indeed you may.

Mr. Kennedy: Your Honor, the defendant will object to these documents. I do not believe they are in proper form [73] of a certified copy of any-

thing. And they do not indicate what the particular charge or warning is supposed to indicate.

The Court: Very well. Let me see them. I take it 19-A is the operator's license from California.

Mr. Bosch: Yes, your Honor.

The Court: Now, may I inquire? First of all, are you objecting to these documents on identification?

Mr. Kennedy: No. I have admitted the identification.

The Court: The identification. Very well.

Mr. Kennedy: But, I do not believe that they are in sufficient form to—they indicate that they are supposedly violations or warnings. Some of them are—one in particular is beyond three years of the date of the application. It has no relevancy. And also for the purpose of the record, although it's possibly premature, I think that the insurance company is bound by the grounds of their rescission stated in their letter to Mr. McKinzie of September 23rd, 1957, which does not include the matters which are being offered at the present time.

The Court: Where is that? That letter has not been offered in evidence yet, has it?

Mr. Bosch: No. But I expect to offer it.

Mr. Kennedy: Would you offer it, please?

The Court: Now, picking up 19-B, can this Court take judicial knowledge of Code Section 577?

Mr. Bosch: I would expect the Court to do so. And, for assistance to the Court in that respect I have a copy of West Annotated California Codes

which refers to the Code sections which are used in those exhibits.

The Court: That is state law as distinguished from municipal order?

Mr. Bosch: Yes, your Honor. This is the state code.

The Court: This Court is bound to take judicial knowledge of the laws of the various states of the United States and possessions, as well as the executive acts of a sister state. So, I hold that Plaintiff's Exhibit 19-A, being an administrative act of the sister State of California, being the purported operator's license, will be received in evidence.

(At this point a photostatic copy of California Operator's License of Art Allen McKinzie was marked for identification and received in evidence as Plaintiff's Exhibit 19-A.)

The Court: Exhibit 19-B, being an executive order, administrative act of the State of California, will be received.

(At this point a photostatic copy of a document purporting to be an abstract of judgment was marked for identification and received in evidence as Plaintiff's Exhibit 19-B.)

The Court: The same applies to 19-C. It will be received.

(At this point a photostatic copy of a document purporting to be an abstract of judgment was marked for identification and received in evidence as Plaintiff's Exhibit 19-C.)

The Court: I would suggest D is not within the three years——

Mr. Bosch: If that's so, your Honor, then I will not urge, certainly, that it be——

The Court: Take a look at it.

Mr. Bosch: Your Honor, the date is April 16, 1957. As I read this the date of the violation on this is 4-6-55.

The Court: Oh. '55?

Mr. Bosch: Yes, your Honor.

The Court: Oh, I beg your pardon.

Mr. Bosch: That comment, as I remember it—I think maybe there are some that are past the three years and I will not urge——

The Court: The same as applies——

Mr. Bosch: ——urge the admission of those beyond the three years, admitting that they are not relevant.

The Court: 19-D will be received. [76]

(At this point a photostatic copy of a document purporting to be an abstract of judgment was marked for identification and received in evidence as Plaintiff's Exhibit 19-D.)

The Court: What do you claim for 19-F?

Mr. Bosch: That would be three years and two weeks, your Honor, so I withdraw my offer of that.

The Court: It will be rejected. I believe E bearing the date of 3-7-54—E and F will be rejected.

What do you claim for G?

Mr. Bosch: Your Honor, only this, and not too strenuously: but if the facts have been correctly represented here it would have afforded the plain-

tiff an opportunity to make its own investigation which would have disclosed the information which is in 19-G.

The Court: Well, I will go with you on that.

Mr. Bosch: To that extent it would be relevant.

The Court: I will withdraw that. Your theory goes to these others. I will reject G.

Mr. Bosch: Your Honor, I note that it is drawing close to 5:00 o'clock.

The Court: Do you have any more preliminaries? Are you about to go into your evidence now?

Mr. Bosch: I expect to call another witness, the man that took the application. [77]

The Court: How long would that last?

Mr. Bosch: I wouldn't expect mine will be very extensive.

REUBEN SNYDER

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Clerk, was examined, and testified as follows:

Mr. Bosch: Mr. Snyder, it's important that you speak sufficiently loud or loudly so that the people at the end of the jury box can hear you.

The Witness: Yes.

Direct Examination

Q. (By Mr. Bosch): Would you state again for their purpose in case they didn't hear you earlier your full name?

A. Reuben Edward Snyder.

Q. And where do you live, Mr. Snyder?

(Testimony of Reuben Snyder.)

A. 3003 Northeast 15th, Portland.

Q. In April of 1957 were you employed by the Bucholz Insurance Agency? A. Yes, I was.

Q. And was that agency an authorized representative of Mayflower Insurance Exchange? [78]

A. Yes, they were.

Q. Mr. Snyder, the Crier is handing you what has been introduced in evidence in this case as the Plaintiff's Exhibit No. 1. A. Yes.

Q. Do you recognize what that is? A. Yes.

Q. Now, on April 16, 1957, did you have occasion at the office of Mr. Bucholz where you were working to take the application from Mr. McKinzie for his insurance policy? A. Yes, I did.

Q. In the course of doing that did you fill out the application which is in front of you and marked, identified as Plaintiff's Exhibit No. 1?

A. Yes; I filled it out.

Q. How much of the handwriting on that sheet was made by you?

A. All of it except Mr. McKinzie's signature and some home office code here that was——

Q. Can you identify the home office writing or marks, or whatever they are? A. Yes.

Q. As distinguished from what you put on it?

A. Yes, I can.

Q. How would you do that?

A. Well, they're all in red ink. [79]

Q. Would it be correct to say that everything other than Mr. McKinzie's signature which is in blue ink was your handwriting?

(Testimony of Reuben Snyder.)

A. Yes; all except the signature. There is a notation on the top, "Plaintiff's"—

Q. Well—

A. ——"Deposition Exhibit 1." But other than that—

Q. And does your remark apply equally as well to the back of that exhibit? A. Yes.

Q. Now, Mr. Snyder, can you tell us about what time of day you took this application from Mr. McKinzie?

A. It was late afternoon at close to 6:00 o'clock.

Q. Do you recall whether there was anyone else in the office or not? A. No; there were not.

Q. Then you were in the office all by yourself at the close of the day? A. Yes.

Q. Now, when Mr. McKinzie came in was anyone with him? A. No; he was alone.

Q. So there were just the two of you in the office this day when you took the application?

A. Yes.

Q. Now, and just as best you can, do you recall the very [80] words that were used? Do you recall what Mr. McKinzie said to you when he came in the office?

A. Well, he asked—he told me that he would like to insure an automobile.

Q. Then what did you do?

A. I reached for an application and put it on the counter and proceeded to ask him the questions.

Q. What questions are you referring to?

A. Well, the questions on the application: His

(Testimony of Reuben Snyder.)

name—I asked his name, his address, and he told me. I wrote that down.

The Court: I think this is a good place to interrupt. You are getting into the substance.

Members of the jury, we will recess for the evening. Recall the admonition of the Court. Do not discuss the matter among yourselves nor permit any person to discuss it with you.

Tomorrow morning at 10:00 o'clock, please. 10:00 o'clock, please.

(At 5:00 o'clock p.m. this date Court adjourned.) [81]

Morning Session

(At 11:20 o'clock a.m. Court reconvened this matter.)

Mr. Bosch: Mr. Snyder, would you resume the stand, please?

(At this point Mr. Snyder resumed the witness stand, having been previously sworn, and was examined and testified as follows:)

The Court: You have been sworn. Just have a chair. Recall your oath, sir.

Direct Examination—(Continued)

Mr. Bosch: Would you hand him a copy of the application which he had yesterday?

(At this point the Crier did as requested.)

Q. (By Mr. Bosch): Mr. Snyder, it's my recollection when we recessed last evening, yesterday afternoon, you were just commencing to tell the

(Testimony of Reuben Snyder.)

jury and the Court what transpired when Mr. McKinzie came into your office on 39th and requested that you write some insurance for him. Now, you still have before you what has been introduced into evidence as Plaintiff's Exhibit No. 1. Had you ever known Mr. McKinzie before this day on April 16th?

A. No.

Q. Now, will you tell us again—perhaps it may be somewhat [82] repetitious—but again, what transpired from the time that Mr. McKinzie came in the door of the office and what was said by him and by you?

A. Well, he walked in and asked for insurance on an automobile. And I picked an application up and proceeded to ask him his name and address and occupation. Gave those to me.

Q. May I interrupt you a moment, Mr. Snyder? This application that you referred to, is it one copy or is it a number of copies, or can you tell us about that?

A. No. It's three copies. It's made up one for the home office, one for the insured and one for our own file.

Q. I see. There is a carbon—

A. Carbon paper.

Q. Excuse me. Go ahead.

A. He gave me the occupation, name, and address, and I put them down. And the effective dates to determine the length of the policy and what type of coverage that he wanted and description of the car. I asked him the make and model, the cost of

(Testimony of Reuben Snyder.)

the automobile, and I wrote that down and figured the price and asked him if there was any loss payable, the name of the finance company, and put that down. Then went on to ask him the underwriting statements—or, the applicant's statement. And I asked him, "Any physical impairments?" and he said, "No."

Q. Let me interrupt you a moment, Mr. Snyder. Are you [83] saying that you read these out loud to him just as they are printed on this application? A. Yes; I read them out loud.

Q. And he responded out loud? A. Yes.

Q. And the answers which he gave you out loud are the ones that you put on here in your own handwriting? A. Yes; that's right.

Q. Go ahead.

A. Well, I went on through the applicant's statement reading the questions and—"Had the insurance been cancelled or refused, any license revoked or suspended, citations or fines?" and he proceeded to give me a "No" answer. Went on through the statements, where he worked, and he told me different—his age and whether he was married or single and he told me, and as he told me I wrote that down.

I asked him about unrepaired damage to the car and he told me "No"—or, he told me that there was none and I put that down.

Q. Now, after you finished the completion of all that information what did you do then, Mr. Snyder?

A. After we completed the applicant's state-

(Testimony of Reuben Snyder.)

ment I dated the application and returned it to him for his signature.

Q. At this time when you were talking with Mr. McKinzie how were you located? Were you sitting in chairs or were you—one standing—— [84]

A. No. We were both standing, one on one side of the counter and one on the other.

Q. You were face to face with the counter between you? A. Yes.

Q. I see. I interrupted you when you said you returned the application to him for his signature. Go ahead.

A. And he signed the application.

Q. Then was anything else said?

A. Well, the money part of it came up, how it was to be paid. And he asked if he could pay something down and the remainder at a later date, and I told him that he—I am quite sure mentioned or asked me if twenty dollars would be sufficient and I said it would. I made—he paid me the money, I made the receipt, gave him a copy of his receipt, a copy of the application, and he left the office.

Q. All right. Now, Mr. Snyder, directing your attention to the other side of this application, Plaintiff's Exhibit No. 1, the information there, when was that filled in?

A. The information on the back was, possibly, the next day.

Q. Now, I notice that that information on the back bears the signature in two places of George Bucholz as agent. A. Yes.

(Testimony of Reuben Snyder.)

Q. Did Mr. Bucholz sign that? Is that his signature? A. No. [85]

Q. Who signed his name?

A. I signed it.

Q. Is that the ordinary practice in your office to— A. Yes; I sign.

Q. Mr. Bucholz is the agent, your employer?

A. That's right.

Mr. Kennedy: Are you offering this?

Mr. Bosch: Yes.

Mr. Kennedy: No objection, your Honor.

Mr. Bosch: Hand it to the witness, please.

(Whereupon the Crier did as requested.)

Q. (By Mr. Bosch): Mr. Snyder, the bailiff has handed to you what has been introduced in evidence as Plaintiff's Exhibit No. 2. Will you tell us and the members of the jury what that is?

A. Yes. This is a receipt. The district agent's copy or our office copy of a receipt that I made out and gave to Mr. McKinzie. Gave him a copy for him. It's in triplicate; a copy for the—for McKinzie or the insured, the agent, and the home office. This is the district agent's copy or our copy of that receipt.

Q. How much money? A. Twenty dollars.

Q. Now, I understood you to say that this application was made up in triplicate. Will you tell us where those various—where those three copies go? [86]

A. Of the application?

Q. Yes.

(Testimony of Reuben Snyder.)

A. One stays in our office, one is given to the insured, one is mailed to the home office.

Mr. Bosch: I see. Your Honor, has Plaintiff's Exhibit No. 2 been received?

The Court: No, it has not.

Mr. Bosch: I offered that.

The Court: Any objection.

Mr. Kennedy: No objection, your Honor.

The Court: It will be received.

(At this point a pink document purporting to be a receipt entitled District Agent's Copy was marked for identification and received in evidence as Plaintiff's Exhibit 2.)

Q. (By Mr. Bosch): Did I understand you to say, Mr. Snyder, that one of these copies was mailed on this particular application to the home office?

A. Was mailed to the home office?

Q. Yes. A. Yes.

Q. That copy that appears in front of you which is introduced into evidence as Plaintiff's Exhibit No. 1, is that [87] the copy that was mailed to the home office?

A. This is the original copy, the home office copy.

Mr. Bosch: No further questions.

The Court: Cross examination.

Mr. Kennedy: Your Honor, may I have Mr. Snyder's deposition made a part of the record?

The Court: Was it in the file? That is Reuben Edward Snyder?

Mr. Kennedy: Yes.

(Testimony of Reuben Snyder.)

The Court: Let the record show that there is among the files of the cause in the hands of the Clerk a sealed envelope bearing the legend "Deposition of Reuben Edward Snyder Taken in Behalf of Defendants," bearing the Clerk's filing date of March 11, 1958. Will the Clerk please break the seal and remove the contents and mark the same Defendants' Exhibit 20 for identification.

(At this point a deposition of Reuben Edward Snyder taken on February 21, 1958, was marked for identification as Defendants' Exhibit 20.)

The Court: Are there any objections to the publication of the deposition?

Mr. Bosch: None, your Honor.

The Court: The deposition will be published and made a part of the record of the cause. It is ordered published. [88]

Mr. Kennedy: May I proceed, your Honor?

The Court: Indeed you may.

Cross Examination

Q. (By Mr. Kennedy): Mr. Snyder, how long have you been employed by Mr. Bucholz?

A. Approximately two years.

Q. In what capacity?

A. As—actually, as office manager.

Q. You are the office manager?

A. I was, yes.

Q. What is your capacity right at the present time?

(Testimony of Reuben Snyder.)

A. I am not—no longer with Mr. Buchholz.

Q. I see. Mr. Bucholz was an agent for Mayflower Insurance Company, was he not?

A. Yes, he was.

Q. And he writes directly for Mayflower Insurance Company? A. Yes.

Q. Had you worked for Mayflower Insurance Exchange prior to your employment with Mr. Bucholz? A. Yes, I had.

Q. And when and where was that?

A. Out of the North Portland office under Bob Bricker.

Q. And—— [89]

A. And then in the West Burnside office as a substitute agent and also in Milwaukie as a substitute agent.

Q. And for how long a period of time?

A. Well, it started in September—well, it started in '55 in the North Portland office and went on through.

Q. Mr. Snyder, do you recall Mr. McKinzie being in your office and making an application for this insurance? A. Yes.

Q. Mr. Snyder, I am afraid I am a little bit confused. Do you recall when your deposition was taken in Mr. Bosch's office on February 21st, 1958?

A. Yes.

Q. And that you were placed under oath at that time? A. Yes.

Q. Now, I am going to ask you, Mr. Snyder, if you recall the following questions and the fol-

(Testimony of Reuben Snyder.)

lowing answers that you gave at that time. Would you like a copy of your deposition?

A. It would be all right.

Q. Now, I am referring to the bottom of Page 8, Mr. Snyder, right at the bottom. A. Yes.

Q. Do you recall the following question and answer:

“Q. Do you recall your discussion with Mr. McKinzie while he was in your office?

A. No, I don't. [90]

Q. You don't recall what was said by either one of you,— A. No.

Q. —I take it?

A. I was—other than the questions there, that's the only thing that I can—

Q. Well, what I am asking is, Mr. Snyder, do you have any recollection yourself as to what was said by either one of you at that time?

A. I just don't remember.

Q. You have no memory about it at all then; is that correct?

A. Yes, that's correct.”

Do you recall those questions and answers?

A. Yes, I do.

Mr. Bosch: If your Honor please, I would like the record to show that those questions and answers were given before the deponent had an opportunity to have the copy of what he has testified to before this morning in front of him. The deposition will show that at this point Mr. Kennedy then handed him a copy.

(Testimony of Reuben Snyder.)

The Court: You may take that over on cross examination.

Mr. Bosch: All right, sir.

Mr. Kennedy: I think we can continue with that, Mr. Snyder. [91]

Q. Those were your answers at that time?

A. Yes, they were.

Q. Now, Mr. Snyder, turning to Page 10—or, rather, on the bottom of Page 9, first, do you recall these questions and answers:

“Q. Now, whose handwriting appears on this application, Mr. Snyder?

A. That’s all my handwriting with the exception of the signature.

Q. And you have no independent recollection as to what was said or done at that time?

A. No.

Q. Is it a fair statement that you do not remember anything about it except just the mere fact of this application? A. Yes.

Q. Don’t misunderstand me, Mr. Snyder; what I am trying to find out is if you know anything at all at the time when this application was prepared, I want to know about it. If you don’t, you don’t, and I take it that you do not know, you cannot recall anything that was said or done at that time?

A. No, that’s right.”

Were those the answers you gave to those questions? A. Yes, they were. [92]

(Testimony of Reuben Snyder.)

Q. And at that time you had the application in front of you, did you not?

A. I believe so. I think it was handed to me.

Q. Refer back to the middle of Page 9.

A. Middle of Page 9. Yes. Uh-huh.

Q. You had the application in front of you, didn't you? A. Yes.

Q. Now, Mr. Snyder, do you recall whether a person by the name of Mr. Sam Dardano who owns Sam's Auto Mart referred Mr. McKinzie to you?

A. No, I don't. I don't recall.

Q. You do not recall that he called you?

A. No.

Q. Does he ever call you with respect to prospective applicants? A. He has.

Q. And does he give you the information regarding the insurance that they want and the automobile, and things like that?

A. He may say he is sending someone down, he has purchased a Cadillac. But, information from a car dealer would not be enough. It wouldn't substitute for the man. The man has to be there. He has to come in. So it wouldn't make any difference. I wouldn't list him anyway.

Q. But, he does that on some occasions? [93]

A. He might tell me what kind of a car the man had purchased. May.

Q. Now, did I understand your testimony, Mr. Snyder, that you said that you gave a copy of this application to Mr. McKinzie? A. Yes, sir.

Q. I mean, do you directly recall that?

(Testimony of Reuben Snyder.)

A. Yes.

Q. You're not basing that on the usual practice, are you, Mr. Snyder, or do you have an independent recollection there?

A. I gave him a copy.

Q. I will refer you to Page 11 of your deposition, Mr. Snyder, starting with the question, and I will ask you if these questions were asked of you and if you gave these answers:

"Q. Perhaps you didn't understand my question. The question is, is it your usual practice to give a copy of the application to the applicant?

A. Yes, it is.

Q. Do you have any independent recollection that you actually gave a copy of this application to Mr. McKinzie, or is that just based on your usual custom?

A. Well, I am sure that I gave it to him.

Q. Do you remember that yourself from your own knowledge? [94]

A. No, but it is the usual practice.

Q. Your answer then is based on your usual practice? A. Yes."

Were those the answers you gave to those questions? A. Yes.

Q. Your testimony now is that you of your own recollection recall that you gave him a copy of the application? A. Yes.

Q. Is your memory better now, Mr. Snyder, than it was on February 21st, 1958?

A. I am quite sure it is somewhat, yes.

(Testimony of Reuben Snyder.)

Q. Now, what happened to the insurance policy in this particular case? Was it returned to you?

A. It was returned to our office from the home office.

Q. What did you do with it?

A. Well, actually, I have nothing to do with that part of the operation.

Q. I take it you do not know, then, or do you?

A. I know what happened to it, yes.

Q. Well, what happened to it?

A. There was a copy sent to the mortgagee, there was one to the insured, and a copy placed in our file.

Q. How long did it take to complete this application, Mr. Snyder?

A. I would say twenty, twenty-five minutes. [95]

Q. Do you recall it being twenty or twenty-five minutes? Do you recall of your own knowledge that it was twenty or twenty-five minutes?

A. You mean it was either twenty or twenty-five?

Q. Yes.

A. No, I didn't time myself on it, no.

Q. When did Mr. McKinzie come into the office, approximately?

A. Approximately? Approximately 5:30.

Q. Yes. And he left approximately when?

A. Approximately 6:00 o'clock.

Q. Now, as I understand it, Mr. Snyder, you signed the name of Mr. Bucholz, who was the agent, to the back of this agent's statement.

(Testimony of Reuben Snyder.)

A. Yes; that's true.

Q. Is it your normal practice to sign his name to these applications? A. Yes, it is.

Q. Then you forward it on to the insurance company? A. Right.

Q. Now, Mr. Snyder, getting back to this question of how long it took to complete the application, I again refer you to Page 7 of the deposition and ask you if the following questions were asked you and whether you gave the following answers:

“Q. How long did it take? [96]

A. Oh, it probably would take twenty-five minutes.

Q. Is that your best estimate of how long it took for Mr. McKinzie's application, or do you remember?

A. No, I don't remember.”

Did you make those answers?

A. Yes.

Q. Mr. Snyder, I am confused. I mean, any explanation you want to make, go ahead and do so.

A. Well, at this time I was certain that you wanted me to put a definite—twenty-one and a half minutes, or something like that. Well, I cannot do that.

Q. What I wanted, then, Mr. Snyder, and what I want now is just what occurred. A. Yes.

Q. Do the questions and answers in your deposition refresh your memory any or do you still believe you have a definite recollection of what occurred in there?

(Testimony of Reuben Snyder.)

A. I have a definite recollection of the application. I don't know whether the man was dressed in a suit or whether he had a sport coat on or whether he said "Good morning!" or "Afternoon!" I don't know about that.

Q. What time does your office normally close?

A. Six o'clock.

Q. Well, you were the only one there at that time?

A. Yes. [97]

Q. Could you describe Mr. McKinzie for us?

A. No.

Q. Could you give us any description of him at all?

A. He was, of course, a middle-aged man.

Q. Do you have Plaintiff's Exhibit No. 1 still before you, being the application? Do you have it before you now, Mr. Snyder?

A. Yes.

Q. I direct your attention to the bottom of the application where, apparently, appears the signature of Mr. McKinzie. And you notice that there is a line or check mark placed there. Did you place that on the application?

A. Yes, I did.

Q. And you placed it there for him to sign it, is that correct?

A. That's correct.

Mr. Kennedy: That's all, Mr. Snyder. Thank you.

The Court: Redirect?

Redirect Examination

Q. (By Mr. Bosch): Mr. Snyder, referring again to this deposition which was taken in my

(Testimony of Reuben Snyder.)

office on February 21, 1958, and directing your attention to Page 16, these are questions which I put to you commencing at the foot of the page. The question was this: [98]

“Q. Mr. Snyder, directing your attention to that application which was, by your testimony, signed by Mr. McKinzie, you told us that all of the handwriting that appears on that application is yours except for that signature of Mr. McKinzie. Do you recall having secured the information that you put down in your own handwriting?

A. Yes.”

Did you give the answer “Yes”?

A. Yes.

Q. “Q. Will you tell us how you secured the information?” Your answer was: “A. I stood at the counter and asked the man the questions.” And I put the question:

“Q. Well, then, starting at the top of the application, just tell us exactly what you asked him and what he responded.”

And you answered:

“A. Name——”

And I interrupted you:

“Q. You hadn’t known his name before he walked in that day,” and you responded: “No. Address——”

And then there was an interruption.

Mr. Kennedy: The interruption was that because I wanted the record to show that Mr. Snyder was then reading from the application. [99]

(Testimony of Reuben Snyder.)

Mr. Bosch: Yes.

Q. And then I put the question:

“Q. And as you would ask him these questions, he would respond and give you the answers and you put it down on the application; is that correct?”
And you answered: “That’s correct.”

Do you recall my putting those questions to you and you giving those answers?

A. Yes, I do.

Q. And they are correct? A. Yes.

Mr. Bosch: I have no further questions, your Honor.

Mr. Kennedy: I have no further questions, your Honor.

The Court: That is all, sir. You may step down.
(Witness excused.)

Mr. Bosch: Your Honor, I notice it’s almost 12:00 o’clock. Do you want me to call my—

The Court: So soon? It’s right at 12:00 o’clock. Well, just for the record get him identified.

Mr. Bosch: Yes, your Honor. [100]

RAY T. CARLSON

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Bosch): Mr. Carlson, where do you live?

A. In Seattle at 137 Lakeside Avenue.

(Testimony of Ray T. Carlson.)

Q. And by whom are you employed?

A. Mayflower Insurance Exchange.

Q. How long have you been employed by that company? A. Seven years.

Q. What is your job or employment with that company? A. Underwriting manager.

Q. That's your present capacity with them now, is that correct? A. Yes.

Q. Are you in charge of their underwriting department? A. Yes.

Q. Were you familiar with the underwriting policy of Mayflower Insurance Exchange in April 16th, 1957? A. Yes.

Mr. Bosch: Please hand him Plaintiff's 1.

(Whereupon the Crier did as requested.)

Q. (By Mr. Bosch): Mr. Carlson, the bailiff is handing you Plaintiff's Exhibit No. 1, which is the application signed by Mr. McKinzie. Will you tell the members of the jury what the [101] reasons are for asking these kind of questions that appear in the middle of that application?

Mr. Kennedy: Just a moment. Your Honor, I am going to object. It invades the province of the jury. The document speaks for itself. It calls for a conclusion.

The Court: May I have the question, please?

(At this point Mr. Bosch's last question to the witness was read by the Court Reporter.)

The Court: May I see it, please? I take it you have reference to—

(Testimony of Ray T. Carlson.)

Mr. Bosch: Referring to——

The Court: ——Applicant's statement 6 through 13?

Mr. Bosch: One through 13, your Honor.

The Court: Oh. One through 13?

Mr. Bosch: Yes. I might——

The Court: What is the purpose?

Mr. Bosch: I might say, your Honor, it is necessary in this case for the plaintiff to establish and prove that the representations made by the applicant, the insured, the defendant McKinzie, were material to the risk underwritten.

The Court: I understand that.

Mr. Bosch: And that they relied upon them. My question seeks an answer from this witness who is head of the underwriting department for the plaintiff asking him why these are—it's going to materiality. [102]

The Court: I think that you would be on safer ground in connection with your theory there if you asked him as an underwriter what were the processes he went through in either——

Mr. Bosch: All right, your Honor.

The Court: ——recommending—I assume he recommends or he may issue as an underwriter. I don't know. But you might still advise the jury what his duty as an underwriter is.

Mr. Bosch: Let me——

The Court: We will take a break here.

Members of the jury, we will recess for the lunch

(Testimony of Ray T. Carlson.)

hour. Recall the admonition of the Court. One-thirty this afternoon, please.

(At 12:00 o'clock noon Court adjourned.)

Afternoon Session

(At 1:30 o'clock p.m. Court reconvened pursuant to noon recess.)

The Court: You may continue.

(At this point the witness resumed the stand.)

Q. (By Mr. Bosch): Mr. Carlson, will you explain to the Court and jury what happens to an application when it arrives at your home office in Seattle?

A. If I may skip the preliminaries of its going through the mail, it arrives on the underwriter's desk and he reviews it from top to bottom in more or less the same order that the questions or statements are made on the application. Every question or statement is important. The name and address, occupation, of course, are necessary to identify the insured.

The information on the card is necessary to identify the type of vehicle we are insuring. The coverages are reviewed to see that the limits agree with the limits that can be written by the company and that we will write or won't write certain coverages on the type of car that is submitted for a policy.

The application is reviewed in respect to the mortgagee or lien holder to see that we have sufficient address.

(Testimony of Ray T. Carlson.)

In respect to the applicant's statements which [104] are the most important to the underwriter, those are reviewed to see whether this particular applicant is an acceptable risk.

Q. Well, on this particular application, Plaintiff's Exhibit No. 1, is there anything on that from which you can determine that something was added when it arrived at your underwriting department? In other words, was anything added to that particular application after it left the agent's office, arrived in your underwriting department?

A. Certain information such as our statistical coding.

Q. Well, as I remember the testimony of the previous witness, Mr. Snyder, he identified what he put on the application as being in one color of ink and that some of the things were there in a different color were not his. On that application are there some marks, some figures, and whatnot, that are in red ink? A. Yes.

Q. Would they be put on there by your underwriting department? A. Correct. Yes.

Q. Now, on this particular application, after it had left the underwriter would he make any notation on it as to whether it was approved or not?

A. Yes, he does.

Q. Is there such a notation on that exhibit. Plaintiff's Exhibit 1? [105]

A. Yes.

Q. Now, from the underwriter where would the application go?

(Testimony of Ray T. Carlson.)

A. From the underwriter it would go to a rate clerk that—

Q. Beg your pardon?

A. It goes to a rate clerk that checks the rates that are listed by the agent to see they are correct according to the manual and from the rate clerk it goes to the department that prints the policy.

Mr. Bosch: Would you hand the witness, please, Exhibit No. 3?

(Whereupon the Crier did as requested.)

Q. (By Mr. Bosch): Mr. Carlson, the bailiff has handed to you what has been introduced into evidence as Plaintiff's Exhibit No. 3, a true copy of the policy. Will you explain to the jury how that—where that comes into existence as the application is processed through the office?

A. Our policies are printed up in our IBM department. I assume most people are familiar with IBM equipment. Some companies type them up. But ours are printed by machine.

This application goes into the IBM department and they punch up a card with all—containing all the information on the application and those cards are run through the IBM machines and they in turn imprint on this policy form. The information contained on the policy form is identical with the information on the application. [106]

Q. I see. Then Plaintiff's Exhibit 3 is the policy which was issued upon this particular application?

A. Yes.

Q. I see. Now, Mr. Carlson, you have sat here

(Testimony of Ray T. Carlson.)

during the course of this trial and you have heard the testimony which has been put on here, primarily the deposition of Mr. McKinzie, which was in a dialogue form; also the documentary evidence as to the driving record in the State of California and the State of Oregon. Apparently from those there is a conflict, from those and the statements set forth in the applicant's statement No. 1. If, as the information which has now been developed to be the true information had been reflected on this applicant's statement, would the company have issued this particular policy?

A. Definitely not.

Mr. Kennedy: I object to that, your Honor. It calls for a conclusion. It goes to the very question at issue here. It invades the province of the jury.

The Court: Well, of course, the statement in the question assumes a fact that may or may not—asserts a fact that may or may not be true. So, the jury can determine whether or not that is true.

Now, if you want to lay a hypothetical—

Mr. Bosch: All right, your Honor. [107]

The Court: —and then ask under the rules in existence at that time of the company what would have been the underwriter's duty at that time, you may do so.

Q. (By Mr. Bosch): Assume this state of facts, Mr. Carlson: Assume this particular application came to your underwriting department in Seattle, having been forwarded there by your local office

(Testimony of Ray T. Carlson.)

here in Portland; and the answers to these various questions under the applicant's statements were answered this way: "Have you or any driver of this car any physical impairment?" and the answer there was "No"; "Had any license revoked or suspended?" and the answer there was "Yes"; "Received any driving charges, citations, or fines (not parking) in the past three years?" and the answer there "Yes"; and, then, the second question: "Name of previous insurer? None"—well, I guess, "Some." "Some," not meaning any particular company, but indicating that there had been a previous insurer. Instead of the word "None," "Some." On the basis of that application, and assuming that all the rest of the application was as it appears before you on the Plaintiff's Exhibit 1, would the company with that application under those assumed facts have underwritten this particular insurance policy and issued it to Mr. McKinzie?

A. No.

Q. Now, Mr. Carlson, in April of 1957 at the time that this application was received in the home office, was there a [108] company policy in the underwriting department at that time that was expressed that the company would not issue a policy to anyone who had previous suspension of license?

Mr. Kennedy: I am going to object to that, your Honor. The customary policy of the company certainly isn't binding upon Mr. and Mrs. Gilmont in this case.

(Testimony of Ray T. Carlson.)

The Court: May I have the question, please?

(At this point Mr. Bosch's last question to the witness was read by the Court Reporter.)

The Court: Well, you say "policy."

Mr. Bosch: Perhaps——

The Court: If it had been important to this witness who says he processed this application—— if he can tell what instructions or what his duties were with reference to that, it would be for the jury to tell whether he performed his duties or not.

Q. (By Mr. Bosch): Mr. Carlson, were there very definite instructions given to the members of the underwriting staff in the home office of the plaintiff insurance company that no underwriter would accept as a risk and issue an automobile liability policy to an applicant who truthfully reflected to the company that his license had previously been suspended or revoked?

A. That is correct. [109]

Q. And the underwriters had no authority whatever to issue a policy under those circumstances?

A. No. If I may——

The Court: You may explain.

The Witness: If I may explain that, the underwriting manager in consultation with management could issue a policy under those circumstances. The possibility of such being done would be very meager.

Mr. Kennedy: Excuse me, your Honor. Could I ask some preliminary questions?

The Court: Yes.

(Testimony of Ray T. Carlson.)

Mr. Kennedy: Do you have written rules and regulations regarding your underwriting policy?

A. Yes, we have a manual.

Mr. Kennedy: Thank you.

Q. (By Mr. Bosch): Mr. Carlson, at the time that this application was received in April of 1957 were the underwriters in your Seattle office likewise instructed that they could not accept and insure as a risk a person who had three traffic violations, citations, or fines within three years prior to the date of the application?

Mr. Kennedy: Excuse me, Mr. Carlson. I am going to object to that, your Honor, on the grounds that they, apparently, have written manuals and underwriting instructions. I think they would certainly be the best evidence. [110]

The Court: They would certainly be the best evidence, no doubt. I take it that you have no number reserved.

Mr. Bosch: No, your Honor. I did not expect to offer it. But it is available.

The Court: It will be Plaintiff's 22.

(At this point an Agent's Manual, Mayflower Insurance Company, was marked for identification as Plaintiff's Exhibit 22; and a manual entitled "Rules and Rates, Mayflower Insurance Company," was marked for identification as Plaintiff's Exhibit 23.)

Q. (By Mr. Bosch): Mr. Carlson, the bailiff has handed to you what has been marked for identification as Plaintiff's Exhibit 22. Would you ad-

(Testimony of Ray T. Carlson.)

advise the Court and the members of the jury what that is?

A. This exhibit is a list of instructions——

Q. I am referring, now, to 22, Mr. Carlson. I think that was the large one that went in first.

A. This is a manual that is given to all agents and, also, every underwriter has a copy, giving certain underwriting rules and regulations.

Q. Now, will you direct your attention to what has been marked for identification as Plaintiff's Exhibit No. 23 and, likewise, advise the Court and members of the jury what that is? [111]

A. That is basically the same as the other exhibit.

Q. Are there any other instructions written or otherwise that govern the actions of the underwriters in this particular company other than the manual?

A. The only other things would be memorandums, from time to time, on particular instances.

Q. These manuscripts, volumes, documents, whatever you like, marked for identification as Plaintiff's Exhibits 22 and 23, were these the manuals that were in force and effect and used by the company on April 16, 1957?

A. This Exhibit 23 was the main one in use at that time.

Q. Was 22 likewise in——

A. 22 was used to a certain extent, yes.

Mr. Bosch: We have no further questions, your Honor.

(Testimony of Ray T. Carlson.)

The Court: Cross examine?

Mr. Kennedy: Were you going to offer the manual, counsel?

Mr. Bosch: Yes, your Honor, we will offer them.

Mr. Kennedy: We have no objection.

The Court: They will be received, 22 and 23.

(The two manuals, having been previously marked for identification, were received in evidence as Plaintiff's Exhibits 22 and 23.) [112]

Cross Examination

Q. (By Mr. Kennedy): Mr. Carlson, how long did you testify you have been employed by Mayflower? A. Seven years.

Q. And you are the manager of the underwriting department? A. Correct.

Q. How many states does that cover?

A. Five.

Q. And is that Western States, primarily?

A. Primarily.

Q. And have you been engaged in the insurance business before your employment by Mayflower?

A. Yes.

Q. And for how long? A. Four years.

Q. What company did you work for then?

A. Northern Life Insurance Company in Seattle.

Q. A life insurance company? A. Yes.

Q. Not an automobile casualty company?

A. No.

(Testimony of Ray T. Carlson.)

Q. Now, are you familiar with the claims procedure contained in those manuals, Mr. Carlson?

A. These are basically underwriting manuals. [113] There is a certain section on claims. The basic purpose of the manual was for underwriting, however.

Q. I see. Isn't it a fact, Mr. Carlson, that among the instructions of the company that it is the first duty of an adjuster or claims department to determine the question of coverage; is that correct or not? A. That is always necessary.

Q. That's the first thing you determine, isn't it?

A. Yes.

Q. I mean, that's what you first investigate, the very first thing that you determine? A. Yes.

Q. And from then on you proceed to adjust the risk, is that correct? A. Yes.

Q. Now, Mr. Carlson, do I understand—or, did I understand your testimony—or was it Mr. Bosch's opening statement?—that it's a general practice among casualty companies to take written applications such as this? A. Yes.

Q. You say it is? A. Yes.

Q. Are you familiar with Travelers Insurance Company, their form?

A. I can't say that I am, no. [114]

Q. Are you familiar with Hartford Insurance Company, their forms?

A. I can only answer this way: I have seen a good many forms from other companies. I couldn't

(Testimony of Ray T. Carlson.)

tell you now the names of those companies. Perhaps I have seen them and perhaps I haven't.

Q. Now, Mr. Carlson, is it the practice of the company to make a credit investigation of applicants for insurance? A. At times.

Q. At times? A. At times.

Q. And what organizations do you use?

A. Cooper-Holmes and Retail Credit, generally.

Q. That's a situation where they go out and talk to the neighbors and ask what type of a person they are, and so on, and so forth; is that right?

A. They may talk to neighbors, yes.

Q. Isn't that the usual practice, Mr. Carlson? Or, do you know?

A. It depends on the particular practice of the company that orders the investigation. Some companies do not wish the investigators to—excuse me. I thought you meant talk to the applicant. You were correct. They ordinarily would talk to the neighbors and other informants.

Q. And you, then, are able to determine the general character [115] of your applicant and the desirability of a risk, isn't that correct?

A. To a certain extent, yes.

Q. And you usually conduct those investigations immediately after you receive the application?

A. When they are conducted, yes.

Q. Even though you might issue an insurance policy you still sometimes conduct those investigations and if it is unsatisfactory, then, you cancel them out, is that right? A. At times, yes.

(Testimony of Ray T. Carlson.)

Q. Now, do you follow a practice, Mr. Carlson, of obtaining from the various state agencies a record of the driving experience of each applicant?

A. There again, like investigations, we order them at times, not in all cases, no.

Q. Yes. In other words, in some cases you apply to the Director of Motor Vehicles, say, of the State of Oregon and ask for an abstract of his driving license? A. Yes.

Q. That's a fairly simple process, isn't it, Mr. Carlson? A. Yes.

Q. They will furnish that to you for a dollar, is that right? A. In Oregon, yes.

Q. For detailed records of everything pertaining to the [116] driving record of that particular person? A. Yes.

Q. Now, Mr. Carlson, did you cancel out—no. I shouldn't say "you." Excuse me. But, Mayflower Insurance Exchange, did you cancel Mr. McKinzie after this accident for nonpayment of premiums? Do you recall that? A. That is correct.

Q. I am sorry. I didn't—

A. That is correct, yes.

Mr. Kennedy: Can you hear Mr. Carlson (speaking to jury)?

(At this point some of the jurors nodded their heads.)

Mr. Kennedy: Counsel, could I have those exhibits, please, pertaining to cancellation?

(At this point a document purporting to be an invoice from Mayflower Insurance Ex-

(Testimony of Ray T. Carlson.)

change to Arthur A. McKinzie was marked for identification as Defendants' Exhibit 1; a document purporting to be a letter dated June 28, 1957, from Mayflower Insurance Exchange to Mr. McKinzie, was marked for identification as Defendants' Exhibit 2.)

Q. (By Mr. Kennedy): Mr. Carlson, I have handed you Defendants' Exhibit 1 marked for identification, which [117] purports to be a billing addressed to Mr. McKinzie which advises him that his policy will be cancelled after June 14th, 1957, which was after the date of this accident. Is that the billing that your company forwarded to Mr. McKinzie? A. Yes.

Q. And it advises him of that fact, does it not?

A. Yes.

Q. Now, would you tell us what Defendants' Exhibit No. 2 is?

A. This is a letter sent out after the cancellation.

Q. Addressed to Mr. McKinzie?

A. Addressed to Mr. McKinzie, telling him that we have noted that this policy has been cancelled for one reason or another. It says that "We lost you as a policyholder," and explains how a policy could be reinstated.

This is a form letter sent out to all policyholders that are—drop their policy for any reason.

Mr. Kennedy: Defendant will offer Defendants' Exhibits Nos. 1 and 2, your Honor.

The Court: Any objection?

(Testimony of Ray T. Carlson.)

Mr. Bosch: No objection.

(The invoice and letter having been previously marked for identification were received in evidence as Defendants' Exhibits 1 and 2.)

The Witness: May I make a correction there?

Mr. Kennedy: Yes.

The Witness: This is sent out in cases where there has been a cancellation for a nonpayment.

Q. (By Mr. Kennedy): Now, all of this procedure took place after this automobile accident of June 8th, 1957, did it not?

A. No. One did and one was sent out before the accident.

Q. The billing was sent out——

A. The billing was sent out on June 4.

Q. It advised him that his insurance would be cancelled on what date? A. June 14th.

Q. For what reason? A. For nonpayment.

Q. June 14th was after the date of the accident we are involved in, was it not?

A. I understand the accident date was June 8th.

The Court: May I interrupt, Mr. Kennedy?

Mr. Kennedy: Yes.

The Court: You referred to these as Defendants' Exhibits 1 and 2 and I noticed you had reserved those numbers for the depositions of McKinzie and Dorris, respectively.

Mr. Kennedy: I am sorry, your Honor.

The Court: Can we put them——

Mr. Kennedy: I didn't know that we were fol-

(Testimony of Ray T. Carlson.)

lowing the [119] order set forth in the pre-trial order.

The Court: So let's redesignate them 21 and 22.

(At this point the redesignation was made by the Clerk, redesignating the document marked Defendants' Exhibit 1 as Defendants' Exhibit 21, and redesignating the document marked Defendants' Exhibit 2 as Defendants' Exhibit 22.)

The Court: The two documents first identified as Defendants' Exhibits 1 and 2 are remarked as 21 and 22, respectively, and are received.

Mr. Kennedy: I would like at this time to read this Defendants' Exhibit No. 22 in evidence, your Honor.

It's entitled "Mayflower Insurance Exchange, 2717 Third Avenue, Seattle, Washington. Home Office. Main 4911." Date "June 28, 1957." Directed to "Arthur A. McKinzie, 4619 S.W. View Point Terr., Portland, Oregon."

The number for the policy is "174380." A blank for "Premium due for a full new term \$59.14." Addressed to

"Dear Mr. McKinzie: Have we lost you as a policyholder?"

Your auto insurance is not in force because the premium had not been paid prior to the cancellation date. You can put your Mayflower policy in force [120] by paying the premium for a full new term or on convenient terms as explained on the notice enclosed.

(Testimony of Ray T. Carlson.)

Mayflower continues to save you money without cutting protection or service. Driving your car without insurance is dangerous. Won't you take an important minute now to mail your remittance?

Very truly yours, Mayflower Insurance Exchange."

Down below is printed the designation "As Sound as the Name Is Traditional."

Q. Now, Mr. Carlson, did you have any communication with the Motor Vehicle Department of the State of Oregon after this particular accident?

A. Yes.

Q. And would you state generally the nature of that?

Mr. Bosch: May it please the Court—if I may interrupt a moment, your Honor, as I understand this course of investigation here seeks to develop facts which more properly lie in defendants' case in chief as to whether or not there was an estoppel, waiver, or whatnot.

The Court: Yes.

Mr. Bosch: I think it might be more properly developed in defendants' case in chief.

The Court: Let me have the question.

(At this point Mr. Kennedy's last question to the witness was read by the Court Reporter.)

The Court: That goes beyond the cross examination. [121]

Mr. Kennedy: Did I understand that Mr. Carlson will be available?

Mr. Bosch: He will be available at your pleasure.

(Testimony of Ray T. Carlson.)

Q. (By Mr. Kennedy): Now, Mr. Carlson, on your direct examination you have discussed what are acceptable and what are not acceptable risks. I assume that acceptable and not acceptable risks are set forth in your manual; is that correct?

A. Yes.

Q. Is that correct?

A. Basically, yes. There are certain unacceptable risks that might not be in the manual.

Q. In some cases you will insure someone even though he might be described as not acceptable in your manual; is that correct?

A. It would be an exception and it would not be on a bound application. It would be—it would have to be a case that was submitted on what is termed “on approval.”

Q. You also take applicants under what is known as the assigned risk pool, do you not?

A. Yes.

Q. That’s where the companies rotate on taking applicants where the company will not afford them insurance; is that correct?

A. Generally speaking, that is correct. [122]

The Court: For the benefit of the jury, isn’t that specialized type of coverage?

Mr. Kennedy: I’m sorry, your Honor.

The Court: For the benefit of the jury, you have used the words “assigned risks” which is purely a trade term within the underwriting and insurance business. Is not that a specialized type of risk?

(Testimony of Ray T. Carlson.)

Mr. Kennedy: Yes, it is, your Honor. As I understand it—maybe you ought to have Mr. Carlson explain the term.

Q. Could you explain the term “assigned risk”?

The Court: Just a moment.

Mr. Bosch: I think we are getting into something that is clearly far afield and particularly irrelevant to this particular policy. This has nothing to do with the assigned risk and I don't think it is germane or pertinent to the jury or of any help to the jury.

The Court: The only reason I made that comment is he said, “You do share in assigned risks?” Now that's beyond the scope of our investigation but, on the other hand, the jury is entitled to know what counsel meant by that. That's the only purpose of it. And as long as the jury understands and counsel concedes that “assigned risk” is not an issue in this case and that it is purely a specialized type of coverage—

Mr. Kennedy: That is correct. [123]

The Court: Very well. As long as the jury understands that.

Q. (By Mr. Kennedy): Now, Mr. Carlson, you have stated in connection with the hypothetical question given to you by Mr. Bosch wherein he assumes certain facts that you would not have issued a policy of insurance to Mr. McKinzie. I would like to add to the hypothetical. Would it make any difference in your opinion whether Mr. McKinzie was eligible for a driver's license in the

(Testimony of Ray T. Carlson.)

State of Oregon at the time of the application?
Would that have made any difference in your determination?

A. You mean based on his record as we know it now?

Q. Well, based on the assumptions that counsel gave to you before with the added assumption that he was eligible for an Oregon driver's license at the time the application was made out, would that have any bearing on whether he would be acceptable as a risk or not?

A. It would have no bearing.

Q. It would have no bearing? A. No.

Q. Would it change your answer or have any bearing on whether he was acceptable for a risk if he had a California driver's license at that time?

A. This is still on the basis he had a revocation in Oregon?

Q. That is correct. [124]

A. It would not have changed the decision, no.

Q. Did the fact that there was a violation for driving the truck with a faulty muffler—would that have any bearing on your underwriting determination?

A. Along with other citations, it would. By itself, no. Very little.

Q. It's a rather minor thing as far as underwriting is concerned?

A. By itself as a single citation, yes.

Mr. Kennedy: That's all, Mr. Carlson.

The Court: Any redirect?

(Testimony of Ray T. Carlson.)

Mr. Bosch: No further redirect, your Honor.

The Court: That is all, sir. You may step down. You heard counsel for your company say that you would hold yourself amenable?

The Witness: Yes, your Honor.

(Witness excused.)

Mr. Bosch: At this time, your Honor, we would like to offer into evidence what has been marked for identification as Plaintiff's Exhibits 8 and 9.

The Court: Any objection?

Mr. Kennedy: No objection, your Honor.

The Court: They will be received.

(At this point a letter dated September 23, 1957, from Mayflower Insurance Exchange to [125] Arthur Allen McKinzie was marked for identification Plaintiff's Exhibit 8, and a check dated 9-18-57 from Mayflower Insurance Exchange to Arthur A. McKinzie was marked Plaintiff's Exhibit 9.)

Mr. Bosch: Your Honor, I think at one stage earlier I moved for the admission into evidence of the defendant Gilmont's original answer and I—and as I recall the Court reserved judgment on that. I think it was marked.

The Court: It is on here as 21.

Mr. Kennedy: We still have an objection to it, your Honor. There has been an amended and supplemental answer filed.

The Court: May I see it, please? I don't find

any verification or subscription to the document by the defendants.

Mr. Kennedy: Your Honor, I would be willing to stipulate with counsel that it go into evidence as long as the amended and supplemental answer could go in also.

The Court: Well, I think that's part of your case in chief. That would be, I take it, by way of explanation.

Mr. Bosch: May I see the original for a moment, your Honor?

The Court: Yes, indeed you may.

Mr. Bosch: Your Honor, I appreciate that this particular document is not verified by the defendants Gilmont, which is ordinary in our state practice. However, the agents acting [126] as the representatives for that client made, by that treaty, certain admissions against interest. That is what it is offered for.

The Court: Well, frankly, I just don't know what the sanctity of the——

Mr. Bosch: Well, your Honor, perhaps if I can explain to the Court my sole reason for it—in the original answer the defendants Gilmont admitted that the company issued a policy in reliance upon and were induced by the application. In other words, they admitted that allegation which was made by the plaintiffs in our original complaint. In their answer they admitted that was a fact.

Mr. Kennedy: In——

The Court: Are you in a position to stipulate

at this time that—it is Mr. Pihl, isn't it—Mr. Pihl's signature?

Mr. Pihl: Mr. Pihl, your Honor.

The Court: And Crum, Walker & Buss. Are the defendants Gilmont in a position to stipulate that at the time this answer was filed in this cause bearing the signature of—is it Folger?

Mr. Pihl: Holger.

The Court: —M. Pihl, Jr. of the firm of Crum, Walker & Buss that these attorneys were authorized by the defendants to prepare and file this pleading?

Mr. Kennedy: Oh, I don't think there is any [127] question about that, your Honor. Certainly they were authorized.

The Court: Very well. With that in the record it will be received for the purpose as stated by counsel.

(The document entitled Answer, having been previously marked for identification, was received in evidence as Plaintiff's Exhibit 21.)

Mr. Kennedy: May I at this time, your Honor, offer defendants' amended and supplemental answers?

Mr. Bosch: That's a matter for the defense.

The Court: That's a matter of your case in chief.

Mr. Kennedy: Very well.

Br. Bosch: Plaintiff rests, your Honor.

The Court: Defendants' first witness.

Mr. Kennedy: Defendant will call Mr. Dorris. We are calling him as an adverse witness. [128]

DONALD EUGENE DORRIS

produced as an adverse witness in behalf of the Defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Kennedy): Mr. Dorris, will you state your occupation, please?

A. Insurance adjuster.

Q. By whom are you employed?

A. Mayflower Insurance Exchange.

Q. As an adjuster? A. As an adjuster.

Q. And who is your immediate superior?

A. Mr. Mel Costa.

Q. Now, Mr. Dorris, did you have occasion to investigate the automobile accident between automobiles being operated by Mr. McKinzie and Mr. Gilmont? A. Yes, I did.

Mr. Bosch: May it please the Court, at this point plaintiff would like to interpose an objection to the development of this testimony on a number of grounds. First is this: that so far as plaintiff is concerned defendant has made no contention, set up no defense, which states a good cause of defense in this particular case. The grounds upon which—and I am anticipating what the evidence is going to be here—but I suspect that they will attempt to [129] develop by this witness various defenses based upon estoppel, waiver, laches. And in each instance, your Honor, each one of those elements as a good defense requires a pleading and a proof of prejudice and damage to the defendants Gilmont which has

(Testimony of Eugene Dorris.)

neither been pleaded nor can it be proved in this particular case.

There is no allegation in the contentions, the answer, supplemental answer, pre-trial order, of any contentions or allegations covering the matter of prejudice to these particular defendants or to the defendants Gilmont.

The Court: I think I see your point.

Members of the jury, the Court has arrived at a place where it has got to cross the bridge of determination of several legal problems that will develop, of course, in the remainder of the trial. And there will be considerable discussion among counsel with the Court concerning evidence, and that sort of thing. Now, please make yourselves comfortable up in the jury room while we are in discussion here.

(At this point the jury left the courtroom and the following proceedings were had out of the presence of the jury:)

The Court: You may step down, sir.

(At this point the witness left the witness stand.)

The Court: Now, I would anticipate, and counsel can [130] correct me if I am wrong, that we are now going into the investigation and the adjustment of part of the claim arising under issue No. 6.

Mr. Kennedy: Your Honor, what we intend to prove by this witness is that he had knowledge or had reason to know or was placed upon notice of

certain facts wherein as a reasonable man he should have known or actually knew immediately after this accident of June 8th, 1957, that Mr. McKinzie did not have a driver's license in the State of Oregon; that he was placed on notice that at that time an immediate investigation should be made, which he did not do. We further intend to prove by this witness that he talked to police officers in Newport immediately following the accident. That I don't know—I think in his deposition he testified that he was not aware of the contents in the Oregon State Police report but "I am advised that the contents of the police report state he did not have a driver's license"; that thereafter, I would say approximately the first part of July, he contacted either a landlady or a neighbor of Mr. McKinzie and at that time he received information which would indicate that Mr. McKinzie was a person of, possibly, bad moral character. He at that time, then, I believe, contacted or discussed the matter with the claims manager for Mayflower who is in the courtroom, Mr. Costa, and it was decided at that time that they would then [131] apply for—apply for an abstract of the driver's record of Mr. McKinzie from the State of Oregon.

Now, this all started with the first part of July. There will be testimony that quite a few letters were written to wrong places, dollars were not enclosed for the abstract of the driving records; that inquiries went to Seattle and back down to Portland. To make a long story short, it wasn't until September until they received the abstract. The first part

of July until September. Used no diligence at all, I mean, to obtain it.

In addition, during that period of time he contacted Mr. McKinzie at the Veterans Hospital here in Portland, took a statement from Mr. McKinzie. At that time he either was advised of the facts concerning the driving record or he should have been.

Thereafter he took a release and proof of loss from Mr. McKinzie. He paid the property damages under the insurance policy to City Finance and to Mr. McKinzie.

The Court: I suppose McKinzie had a fifty-dollar or a hundred-dollar deductible?

Mr. Kennedy: I am not certain.

Mr. Bosch: Fifty, your Honor.

The Court: Well, property damage to McKinzie.

Mr. Kennedy: Let me finish, counsel.

Mr. Bosch: I think the Court, from the remark, has a [132] mistaken——

The Court: Well, I——

Mr. Bosch: All right. I won't interrupt again. I will make my——

The Court: I will make it clear to counsel. When you said property damage I thought you had reference to McKinzie's car.

Mr. Kennedy: I do have reference to McKinzie's car. But I think almost all of the interest in the car belonged to the finance company.

The Court: I would assume so.

Mr. Kennedy: And a check was made payable to both of them. Then the company received a notice or received the abstract of driving record, I

believe, on approximately December 3rd. The actual letter of rescission was not written to McKinzie until, I believe it was, September 23rd. The lawsuit was not commenced until, I believe it was, the first of October. I am not certain. The entire procedure in this particular case going from June 8th up until about October 1st showed a—first, a complete lack of due care in investigating the accident at all. It further showed that they had—that they had reason to know as a reasonable person that there was something wrong with the driving record of Mr. McKinzie early in the investigation. And I have cited authorities to the Court in the memorandum of law with respect [133] to that.

It shows unreasonable delay, laches, negligence, and certainly shows an affirmation or an estoppel under their insurance policy. And I particularly call to the Court's attention the Ninth Circuit Court case of Massachusetts Bonding & Insurance Company vs. Anderegg, 83 Fed. (2d). I might further state for the record, your Honor, that this particular matter here with respect to the testimony of the actual person who adjusted this loss, if defendants Gilmont are not permitted to introduce this testimony, it in effect removes all of the affirmative defenses of defendants Gilmont from the pre-trial order.

The Court: Thank you. Well, you say that you have cited authority to the effect that if the insurance company pays a mortgagee that constitutes a waiver to the mortgagor.

Mr. Kennedy: No, I didn't mean that, your

Honor. I think the fact of paying—the fact of taking the release and proof of loss, makes the check payable to both the mortgagor and to the insured, is just one act in the acts and conduct which constituted waiver and estoppel.

The Court: How did that affect these plaintiffs?

Mr. Kennedy: You mean Mr. and Mrs. Gilmont?

The Court: I beg your pardon. Now, the defendants Gilmont.

Mr. Kennedy: Well, your Honor, it will also go into the [134] question of the negotiations with the attorneys for Mr. and Mrs. Gilmont. The matter was delayed up until October. If the lawsuit had been filed initially I think that there would definitely have been an appearance at that time. And also I think they are entitled to rely on any particular defense that Mr. McKinzie might have.

They come into court here and say, “We stand in the same shoes as Mr. McKinzie. Well, then, we ought to be able to have the same benefits, also.” Now, it is certainly prejudicial to Mr. McKinzie.

The Court: I take it they are defending under reservation.

Mr. Bosch: That’s correct, your Honor. But it’s not proper for us to introduce at this time what we have available. May I ask——

The Court: I will hear you.

Mr. Bosch: Now?

The Court: I just wanted to get these questions.

Mr. Kennedy: The case I had reference to, your

Honor, was—within the memorandum was Points & Authorities No. 8.

The Court: Points & Authorities No. 8?

Mr. Kennedy: And what I had reference to is that it isn't necessary to actually prove that a person had actual knowledge. It is more or less incapable of proof in some cases. But the standard required is that of a reasonable, [135] prudent person.

The Court: I agree with you. Extending this principle a little further, it goes to what is material and what is not material.

Mr. Kennedy: Well, that's correct, your Honor.

The Court: That's what it amounts to. Putting it this way, the underwriter must act reasonably in connection with the usual, reasonable standard in determining in his own mind whether or not a representation is material to the risk such as the witness said, a citation for driving without a muffler in and of itself would not be material to the risk. That is based upon reason.

All right, Mr. Bosch. I will hear you.

Mr. Bosch: Your Honor, I quite agree with Mr. Kennedy that the defendants Gilmonts' rights and remedies in this particular case are derivative. They can be no better than Mr. McKinzie's.

Now, Mr. McKinzie got an insurance policy in this particular case at least, so far as the evidence we have before this Court is concerned, solely because he misrepresented to that company material facts as to his prior driving record and the fact that he had been suspended in the State of Oregon;

that he had no Oregon driver's license; hadn't had one for a number of years; had done drag racing, and whatnot. So there is no evidence except what we have [136] heard from the defendant McKinzie by his own admission. He concedes the fact that he has given false and material representations to the company. But for those false and misleading representations he never would have had a policy.

Now, the Gilmonts can have no greater rights than McKinzie does. Certainly the Gilmonts cannot take the benefit of McKinzie's fraudulent misrepresentations by asserting some kind of an estoppel when they cannot hope to plead and prove the very fundamental and necessary requirement of an estoppel, waiver, or laches. And that is that they have been prejudiced in some way by relying on something that the insurance company has done.

There is no pleading whatsoever by the Gilmonts that they have done anything in reliance upon what the insurance company, its adjusters, its investigators, its underwriters, or any of the rest of its agents have done. Their position is no better and no worse than it was immediately after the accident. The accident certainly didn't happen in reliance on the fact that McKinzie was going to have a twenty automobile liability policy. In other words, they are no better or worse today than they were the day, unfortunately, that McKinzie struck them. That is not plaintiff's fault. Plaintiff has done nothing since then. Plaintiff conducted an ordinary investigation. In the course of that investigation plaintiff came across facts which caused us to request

a motor vehicle record from Salem. Then sometime afterwards in the early part of this year when we took the deposition of McKinzie we find out by his own admission that not only had he had a suspension of his license but he also had a record down there in California. We found that only because he indicated that he used to drive a car down in California and he had a license.

So, I wrote to California and asked them also to give us an abstract. That wasn't discovered by anybody investigating the original accident. He also told us that he had other insurance companies but he couldn't tell us who they were or whether they were cancelled, revoked, or what. There is nothing dilatory about anything that was done here, your Honor. And even assuming that it might be, nothing—even if it was dilatory or somewhat negligent there isn't any showing that it hurt anyone.

We owed no duty to anyone that we violated. Negligence infers a duty, or you look for the duty before you talk about negligence. There is no duty here to anyone. McKinzie has been in this jurisdiction since the day of the accident. He has been available for the defendants Gilmont and the rest of the members of their family to serve him with all kinds of processes in any lawsuit they want to bring. His assets are no better or worse than the day he hit them. He is here and he has all the remedies against McKinzie. [138] But certainly they have their reliance on what the insurance company had done or told them. There is no prejudice, your Honor. Certainly they shouldn't be able to take the

benefit of McKinzie's false representations. It would give to the Gilmonts a greater right under the contract than the original parties had.

Mr. Kennedy: Are you through, Mr. Bosch?

Your Honor, may I just add a few comments?

The Court: Yes, indeed you may.

Mr. Kennedy: I think Mr. Bosch's argument has pointed out the problem. It's a closing argument on the facts. This is a jury question. That's why we have a jury here to determine the particular facts. It is basic to the law of rescission that you have to act. It goes to their whole cause of action. You must act promptly and you cannot be in a position where you have been negligent or where you have affirmed the contract. It's just basic to your cause of action for rescission and that's all they have in this case is a cause of action to enforce the rescission that they set forth in their letter of September 23rd, 1958. And counsel's statement that we can't have any right to Mr. McKinzie, of course, runs counter to his trying to make us the only subject of his right. If we are going to be subject to them we ought to have, at least, his rights. And counsel ought to be ordered to prove a full cause of action. He can't do [139] it if he has been guilty of estoppel, waiver, laches. They are jury questions.

Mr. Bosch: Your Honor, I don't like to belabor the point to the point where the Court gets somewhat bored, but our case is primarily between two contracting parties, your Honor.

The Court: Yes.

Mr. Bosch: Certainly, the defendants Gilmont, if there is a policy here, have the benefit of it. But that is a secondary matter. They are in it now, your Honor, because of the declaratory judgment suit.

The Court: I would like to think not in the position of the Gilmonts, I would like to think that this action is between Mayflower Insurance Exchange and one McKinzie.

Mr. Bosch: Yes.

The Court: Now, McKinzie is not here defending himself but the Gilmonts defending in his shoes are here conducting his. Now, am I wrong on that on that concept?

Mr. Kennedy: Well, no. I don't think so, your Honor, because they are necessarily placed in that position. They are trying to protect the assets that they have in Mr. McKinzie's insurance policy.

The Court: Do they have any higher right than McKinzie's has?

Mr. Kennedy: I don't think so other than, possibly, the [140] negotiation with the attorneys for them and their forbearance and reliance on it. But they are generally pretty well in the same position.

The Court: I think so. Are you acquainted with Massachusetts Bonding against Anderegg?

Mr. Bosch: I am ashamed to admit, your Honor, that after being served with a copy of that I didn't read that particular case.

The Court: I have taken the one from my library. But there is one downstairs. I want to orient myself with this.

Mr. Kennedy: There is also a considerable

amount of Oregon cases, your Honor, on rescission.

The Court: Oh, yes. I'd say the woods were full of them. Do you want to add anything, having read the case?

Mr. Bosch: Well, your Honor, of course you always start out distinguishing a case on its facts. But obviously there we had, after the Court found what was full knowledge upon the ground which they were entitled to rescind, then the company went on, had another accident, started investigating that, and asked for more premiums and accepted—

The Court: I think that would be an excellent argument for you to make after all the evidence is in.

Mr. Bosch: Your Honor, this is what—some-what a unique case to defend or to try to defend.

The Court: Mr. Bosch, I am satisfied about it. Now, I [141] think that this Massachusetts Bonding Company vs. Anderegg has plotted the course for us. And it comes from this district. It is cited by the Ninth Circuit. And, certiorari was denied. Now, the factual situation in that case at the beginning of it is, of course, the suit by the insured, an action between the insurer and the insured. And I am satisfied that unless there were some subsequent actions on the part of plaintiff in this case that worked to the prejudice of the defendants Gilmont, that they stand in the shoes of the defendant McKinzie, gaining no higher or no lower right than McKinzie had.

Now, first of all, Massachusetts against Anderegg establishes for us the proposition that this is a

proper suit on behalf of the plaintiff because this plaintiff would not have an adequate remedy at law on the one hand against the defendant in the state court cases on the grounds of fraud as pointed out.

Now, while it is true that a suit for declaratory judgment is not necessarily in action—or a suit in equity, it was primarily an equitable matter. But as the rules have been amended to provide, if there are legal questions such as fraud, as claimed here, that is a legal matter and the parties are entitled to a jury.

Now, here is the question: “Was the suit barred by—” we are talking about Massachusetts—“Was the suit barred by laches? One who has been induced by fraud to enter [142] into a contract must, on discovering the fraud, choose at once whether he will rescind the contract or affirm it. If he chooses to rescind, he must announce his purpose at once, and adhere to it. He is not permitted to play fast and loose. He must speak and act promptly. Silence constitutes a waiver of the right to rescind. Delay and vacillation are fatal.

Appellant’s conduct did not meet the requirements laid down by these authorities. Appellant did not, on discovering the fraud here complained of, announce its purpose to rescind the policy. On the contrary, with full knowledge of the fraud, it demanded the payment of additional premiums. After discovering the fraud, it waited more than a month before announcing its purpose to rescind,

and waited two weeks longer before commencing this suit," a period of time of six weeks.

"Meanwhile, and before appellant had announced such purpose, there had been a second accident involving an automobile covered by the policy, thus materially changing the situation of the parties. In view of this change and of all the circumstances here shown, we hold that appellant was guilty of laches whereby its suit to rescind the policy was and is barred."

Bear in mind, a material changing of the position of the parties. It's Hornbook law that the principle is fundamental to the doctrine of laches which is defined as [143] "Such negligence or omission to assert a right as taken in conjunction with the lapse of time more or less great and other circumstances causing prejudice to an adverse party operates as a bar in a court of equity. So, even in a court of law although an equitable affirmative defense is asserted," citing from one of the Oregon cases which is binding upon this diversity suit, "mere lapse of time does not of itself constitute laches although long delay can be certainly claimed as an important element of laches. Mere delay will not ordinarily bar relief where it has not worked injury, prejudice, or disadvantage, to the defendant or others adversely interested."

So, there are your basic elements of laches, a lapse of time, more or less in asserting a right. The Court of Appeals for the Ninth Circuit says "Act immediately." And the second element is a material

change of situation or position of the parties which works to a prejudice of the parties.

Now, I have no way of anticipating what the evidence of the defendants in this case under their affirmative defense of laches will show. But it must show that after having knowledge of the false—the claim of false representations that there was a lapse of time more or less and that these defendants were prejudiced by reason of the nonaction during that lapse of time, if any, by the plaintiff. So, I think [144] that inquiry along the line that has been started is pertinent and material to the one asseration of the defendants: “Has plaintiff been guilty of laches?” Certainly it doesn’t apply as to VI: “Was plaintiff careless or negligent in investigating said automobile accident. . . .?” That has nothing to be brought out. I am satisfied that it would not be pertinent or material under VII: A claimed waiver, nor does it tend to show any estoppel. But I can see where it might tend to be material under laches.

Mr. Kennedy: May we have a brief recess, your Honor, before going on?

The Court: Well, I notice Mr. Bosch is unhappy and wants to say something.

Mr. Bosch: No. I just wanted to clarify my—I don’t mean—to clarify my own thinking, your Honor, Unless I have missed something completely there is nothing in our pleading, our pre-trial order, nothing that’s been developed that I can expect that will in any way establish or is intended to show on behalf of these defendants or McKinzie any preju-

dice, any material change of position. There is no pleading——

Mr. Kennedy: Well, your Honor, I think we are going to have to wait until the evidence is in. If we haven't proved it, then, of course, the Court is going to have to instruct the jury that it isn't there. What Mr. Bosch is trying to [145] do is to prevent us from putting on any case on his understanding of what evidence we are going to put on. So we would have to hear the evidence first.

Mr. Vosburg: There is one other further point, your Honor. Maybe I am speaking out of order. Is the defense by Gilmonts themselves, while they are derivative from McKinzie, permissible where the contracting party himself has not contested the action brought by the plaintiff?

The Court: I think so.

Mr. Vosburg: That's just the point, that I would think that they would not, your Honor.

Mr. Kennedy: They sued Mr. and Mrs. Gilmont and all their children. They must have some rights here.

The Court: Contention of defendants Gilmont III: These defendants contend that the "plaintiff received notice and knowledge of said accident immediately following said collision and thereafter investigated the facts and circumstances involved in said collision and defendants Gilmont are informed and believe and therefore allege that at said time the plaintiff knew, or in the exercise of reasonable care, should have known, that defendant Arthur Allen McKenzie was operating his automobile with-

out a valid driver's license from the State of Oregon."

Now, I believe counsel can correct me, but I believe that the notification that the insurance would be cancelled [146] unless a certain balance of premium was paid was after the suit was instituted.

Mr. Bosch: It was mailed before the accident and was to be effective about seven days following the accident. There is no policy defense on the failure of premium.

The Court: No. I understand that. There is one possibility that V would tend to go to the asserted issue of laches only.

Mr. Bosch: On the payment under collision feature of the policy, your Honor?

The Court: Yes.

Mr. Bosch: I am prepared to argue that and submit cases right on point, your Honor.

The Court: On the question of laches?

Mr. Bosch: No whether it's an estoppel and waiver.

The Court: I agree with you.

Mr. Kennedy: Let's get the testimony in, Mr. Bosch, and then we will argue these questions.

Mr. Bosch: Even then, your Honor, I still don't see in that allegation any pleading as to materially changing position to prejudice.

The Court: Yes. I agree with you.

Mr. Bosch: I don't see in the pleadings——

The Court: But, on the other hand you subscribed to a pre-trial order that sets an issue

up: "Has plaintiff been [147] guilty of laches?"
You subscribed to that very issue.

Mr. Bosch: Your Honor, I can't deny that the defendant has the right to put up his defenses and issues in this, but it's a matter of fact supporting it.

The Court: You certainly can. You can apply to the Court.

Mr. Kennedy: Is it your position you don't want us to put on any facts? You want the Court to decide it without any facts?

The Court: Yes. I think I will adhere to the rule on it.

Mr. Kennedy: May we have a brief recess, your Honor?

The Court: Now, I want to make it certain—and I will have to screen this testimony as it begins to come along—that this goes only to the issue of laches. And, further, I will ask counsel, is it your representation in the record to counsel and the Court that you will offer evidence which you conscientiously claim tends to prove prejudice to these parties?

Mr. Kennedy: Yes, your Honor, either derivative of Mr. McKinzie or themselves. I might ask your Honor, I, of course, for the record feel that we have an affirmative defense of negligence in this cause of action for rescission. Do I understand that the Court is now then ruling as a matter of law that we do not have a defense of negligence as an affirmative defense of their cause of action for rescission? [148]

The Court: For rescission, yes. You are cor-

rect. But not on the basis of their original action. I will subscribe to your theory that the jury must find that they acted reasonably in connection with their claimed false representations material to the——

Mr. Kennedy: I understand the Court at this time is withdrawing the question of waiver.

The Court: Correct.

Mr. Kennedy: And I understand that at this time the Court is withdrawing the question of estoppel.

The Court: Correct.

Mr. Kennedy: And that the Court is withdrawing the question of whether plaintiff had affirmed the contract of insurance with Mr. McKinzie by its acts and conduct.

The Court: Wouldn't that be a question of laches?

Mr. Kennedy: Well, it's not necessarily. I think it's basic to the question of the right to rescind, your Honor.

The Court: Well, I think we are talking about the same thing. The right to rescind, if there was a material false representation, is a right. Now they waive that by being guilty of laches acting to the prejudice of the other adverse party.

Mr. Kennedy: Or it's basic, as I understand it, to the cause of action, your Honor, that you—the cases do not even speak of the magic term "laches." They say that you [149] must act promptly. If you do not you affirm the contract and you're not entitled to rescind.

The Court: Right.

Mr. Kennedy: Because in this particular case, your Honor, being a contract, the Mayflower Insurance Exchange had the right when they discovered it or when they should have discovered it to either rescind or to affirm the contract. They could affirm the contract and they could sue Mr. McKinzie for damages.

The Court: Yes.

Mr. Kennedy: They had those two rights. What we are saying here, your Honor, is by their acts and conduct they affirmed that particular contract of insurance and the right that was left to them was the right that they have to sue Mr. McKinzie for damages.

The Court: I don't know if we are involved in semantics or not, but you claim they followed the course and conduct——

Mr. Kennedy: That's correct, your Honor.

The Court: ——after they knew the falsity of the representations?

Mr. Kennedy: Or should have known.

The Court: Right. Now, you say because they didn't act promptly they affirmed the contract.

Mr. Kennedy: With that knowledge or with the reason——

The Court: And the reason that you say that they affirmed [150] that contract—they didn't do it manifestly or assertedly, they impliedly did it in law—impliedly in law because they are guilty of laches.

Mr. Kennedy: Well, that may be possibly what I am saying, your Honor. It is hard for me to, without putting on the testimony——

The Court: You certainly don't claim that they took any affirmative action in affirming this contract after they knew or should have known of the falsity——

Mr. Kennedy: Oh, yes, I do, your Honor. It's our position here that their affirmative conduct—and it was by their acts and conduct as a legal principle that they affirmed the contract. In other words, with knowing or——

The Court: Well, then, why do you set up the affirmative defense of laches?

Mr. Kennedy: Because it's a separate——

The Court: A separate defense. Well, it doesn't make any particular defense because it would be the same conduct that would make them guilty of laches that would be an implied or an affirmative contract. It would have to be the same conduct. So it doesn't make any difference. We can determine it at a later time which one of those legal propositions you claim should be submitted, if any.

Mr. Kennedy: Very well, your Honor.

The Court: We will take a short recess. [151]

(Recess taken.)

(The following proceedings were had out of the presence of the jury:)

The Court: May I ask of counsel, what is the status of the record in connection with the plaintiff and the defendant McKinzie: Has there been an order of default taken?

Mr. Bosch: No, your Honor.

The Court: Now, the Court made the statement while we were discussing here off the shoulder that it would seem that the defendants Gilmont were in the shoes of the defendant McKinzie. With a little reflection I see that that might tend to be taken by counsel as an indication that the Court feels that there is some type of contractual interest or, better still, privity existing between defendant McKinzie on the one hand and the defendants Gilmont on the other, which I don't find. My mind is open as to whether or not the defendants Gilmont can conduct a defense for and on behalf of McKinzie.

Mr. Vosburg: That was the point I attempted to make, your Honor, and I find no cases that would allow them, where he concedes everything, to assert some kind of a defense or some kind of an estoppel.

The Court: Well, do you find any that they can?

Mr. Vosburg: In all cases; at least, to my knowledge, [152] your Honor, they have always been the—the assured person is the one that's coming in here waving the flag. I don't see how these people have any rights.

Mr. Kennedy: Well, your Honor, I might say this: Of course, the defendants Gilmont certainly have rights as creditors or possible creditors in to the insurance policy.

The Court: Possible creditors, yes.

Mr. Kennedy: That's right. But that's the very reason that the insurance company joined all the defendants Gilmont.

The Court: Supposing they don't get a judgment?

Mr. Kennedy: If they don't get a judgment the question is moot.

The Court: . Now, we have a statute here in Oregon that provides that the judgment creditor may directly levy against the indemnitor of the judgment debtor. But does that create any legal relationship between them prior to a judgment? Do I take it that the plaintiff is in a position to ask for a default against the defendant McKinzie?

Mr. Vosburg: We ask for relief, your Honor. We were frankly going to be guided by the wishes of your Honor. It's a problem that we haven't determined yet. And we are a little uncertain of it.

The Court: There has been no appearance on behalf of defendant McKinzie?

Mr. Vosburg: That's correct, your Honor. [153]

The Court: Well, I guess we had better get down the books.

Mr. Kennedy: I might ask counsel what was the purpose of them joining the defendants Gilmont in this proceedings. They are either going to be bound or they aren't. If they are not part of this proceedings then we are going to have another lawsuit. But if they are going to be bound they certainly have a right to conduct their defense.

The Court: Supposing this: Supposing they had not joined you——

Mr. Kennedy: Then it wouldn't be *res judicata* for them, your Honor.

The Court: ——and you people wanted to inter-

vene. Now, it certainly would be *res judicata* if there is privity between you.

Mr. Kennedy: There is no privity between——

The Court: All right. Then what is your standing in court?

Mr. Kennedy: Well, the standing is this, your Honor: We are made defendants and the plaintiff has asked the Court to declare the rights of the defendants Gilmont along with their rights. Now if we are not properly in court then we are not bound by this proceeding. If we are properly——

The Court: Ordinarily when a defendant is haled into court and he feels he is not a proper party he moves to get [154] out.

Mr. Kennedy: We join in the declaration. We have asked in our——asked in our contentions that they declare the rights.

The Court: As I take it, under the pre-trial order there is no contention on the part of the plaintiff—now, the relief that they are asking the defendants Gilmont is that they be restrained from instituting any legal proceedings against plaintiff for the recovery of the amount of any judgment that the defendants or any of them might hereafter obtain against defendant McKinzie. In other words, the relief that they are asking against the defendants Gilmont that they be enjoined from taking advantage of the Oregon statute in the event they get a judgment.

Mr. Kennedy: I might also refer——

The Court: Yes.

Mr. Kennedy: Excuse me, your Honor. I might

also refer—I find that I do have some authorities on that.

The Court: Thank you. I would be pleased to have them.

Mr. Kennedy: 142 Federal Supplement, 862. I believe that the following two cases also have some applicability to this question, although I am not positive. 157 Federal (2d) 653, and 173 Federal (2d) 924. These were casual notes. I am not exactly positive what these cases hold.

The Court: Well, let's take a look at them. I don't [155] suppose counsel for the plaintiff has had an opportunity to examine these.

Mr. Vosburg: We have not, your Honor.

Mr. Bosch: With Mr. Price's assistance we may soon.

The Court: Well, if you have it before you I suggest you take a look at 157 Federal Reporter.

Mr. Vosburg: 653?

The Court: At Page 658, keynote 10 and 11. Read those and then you can go back to the factual situation. I submit to counsel for the defendants Gilmont that 142 Federal Supplement, Farmers Underwriters against Fales has no application to this case because it appears therein that there had been a judgment entered in the state court.

Mr. Vosburg: Also, it is an absolute liability statute there, your Honor.

The Court: So that has no application.

Mr. Kennedy: As I explained, your Honor, these were casual notes as I went through and I have not had an opportunity—

The Court: I am not saying that you misquoted these.

Here is a case that will be of interest to counsel. It is a United States Supreme Court case, a liability insurer's complaint for declaratory judgment that it was not liable on the policy nor obligated to defend an automobile collision case pending in the state court against the insured presented [156] an "actual controversy." Not only was he insured but also was the injured person who had a statutory right to proceed against the insurer if the insured failed to satisfy a final judgment within thirty days. Now, of course, that doesn't point out to us whether or not that suit was brought after the judgment, but I would be inclined that it must have been brought before the judgment.

Mr. Vosburg: Well, I just wondered here, your Honor, see, here at the state of the record you make a judgment stating we have no obligations to defend Mr. McKinzie in this suit, but then on the other hand you refuse to enjoin them from collecting any judgment that might be rendered against you. In some way you are going to be in the position—the position they take, you are going to get absolute inconsistencies, which is my theory, which is by itself impossible and improper.

The Court: Well, as I say, our question, boiling it down, is may these defendants Gilmont appear for and prosecute any defense that defendant McKinzie has. That is what it amounts to. Now, I have a District Court opinion to bolster my position. It is what I originally was thinking about, and that is

that these defendants Gilmont are proper parties but they are not necessarily indispensable parties. Now, you elected to bring them here and they are before the Court and they are asserting this position. Now you could have ignored [157] them and brought your action solely against McKinzie and they would have been bound by it. However, there is one case here that says that is not *res judicata*.

Mr. Vosburg: Your Honor, I appreciate when we filed a lawsuit we didn't anticipate or know that McKinzie was going to concede that he had made these representations. So we thought them not necessary but, at least, proper parties.

The Court: Well, they are here.

Mr. Vosburg: But McKinzie is not.

The Court: There is the rub.

Mr. Bosch: Well, that's our whole question, what we do in a situation where we don't have our, call him, culprit McKinzie, or whatnot, and what the effect of a judgment against him is.

Mr. Kennedy: Your Honor, I just have one brief statement and I will sit down. It is impossible for me to see how anybody can be bound by any proceedings unless they are made party to it and have a right to put on their particular defense when they are not in privity. If they didn't join him it wouldn't be *res judicata*.

The Court: Well, I am satisfied that if the plaintiff in this case had not joined in the action the defendants Gilmont and proceeded alone against McKinzie with the status of the case so far as the plaintiff against McKinzie now is, they would be

entitled to their relief as they have prayed [158] for against McKinzie on default. But that would not be *res judicata* as to these people in their state suit and, therefore, it would be incumbent upon the plaintiff to assert their legal defense in that action.

Mr. Vosburg: We concede that.

The Court: Now, in order to avoid that — and, perhaps you did have one case, for example, coming from our own district that says that that does not necessarily give you an adequate remedy at law — therefore you have the right to bring this action which you did, and you have the right to name them as proper parties defendants. You hale them in. Now, do they have the right to assert the same defense here that they could if you had attacked them in the state court? That's the whole question in a nutshell.

I am sure that you would concede that you would have the right to appear in the state court and urge these defenses as you here urge against recovery on them and the voidance of the policy to relieve you of the execution of judgment.

Mr. Vosburg: That would be a right on our controversy between McKinzie and us and not on them.

The Court: They certainly could have asserted all of the defenses there that they are now asserting here.

Now, here is the situation in Maryland Casualty Company against Pacific Coal & Oil Company. It came up from [159] the Sixth Circuit to the Supreme Court.

“Petitioner issued a conventional liability policy to the insured, the Pacific Coal & Oil Company, in which it agreed to indemnify the insured for any sums the latter might be required to pay to third parties for injuries to person and property caused by automobiles hired by the insured. Petitioner also agreed that it would defend any action covered by the policy which was brought against the insured to recover damages for such injuries.

While the policy was in force, a collision occurred between an automobile driven by respondent Orteca and a truck driven by an employee of the insured. Orteca brought an action in an Ohio state court against the insured to recover damages resulting from injuries sustained in this collision. Apparently this action has not proceeded to judgment.”

So there we find the same comparable situation we have here.

“Petitioner then brought this action against the insured and Orteca. Its complaint set forth the facts detailed above and further alleged that at the time of the collision the employee of the insured was driving a truck sold to him by the [160] insured on a conditional sales contract.

Petitioner claimed that this truck was not one ‘hired by the insured’ and hence that it was not liable to defend the action by Orteca against the insured or to indemnify the latter if Orteca prevailed. It sought a declaratory judgment to this effect against the insured and Orteca * * *

Same situation here.

“* * * and a temporary injunction restraining the proceedings in the state court pending final judgment in this suit.

Orteca demurred to the complaint on the ground that it did not state a cause of action against him. The District Court sustained his demurrer and the Circuit Court of Appeals affirmed. We granted certiorari to resolve the conflict with the decisions of other Circuit Courts of Appeals cited in the note.

The question is whether petitioner's allegations are sufficient to entitle it to the declaratory relief prayed in its complaint. This raises the question whether there is an 'actual controversy' within the meaning of the Declaratory Judgment Act.

The difference between an abstract question and a 'controversy' contemplated by the Declaratory [161] Judgment Act is necessarily one of degree, and it would be difficult, if it would be impossible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all of the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case.

That the complaint in the instant case presents such a controversy is plain. Orteca is now seeking a judgment against the insured in an action which the latter claims is covered by the policy and sections "of the Ohio code give Orteca a statutory right to proceed against petitioner by supplemental process and action if he obtains a final judgment against the insured which the latter does not satisfy within thirty days after its rendition."

In effect, the same status as we have in Oregon.

"Moreover, Orteca may perform the conditions of the policy issued to the insured requiring notice of the accident, notice of suit, etc., in order to prevent lapse of the policy through failure of the insured to perform such conditions."

That's merely, now, a statutory provision giving the injured party a few more rights. In other words, he can pay premiums that become due and keep the policy from lapsing if that be a situation. But I don't see where that has any bearing in this case.

"It is clear that there is an actual controversy between petitioner and the insured. If we held contrariwise as to Orteca because, as to him, the controversy were yet too remote, it is possible that opposite interpretations of the policy might be announced by the federal and state courts. For the federal court, in a judgment not binding on Orteca might determine that petitioner was not obligated under the policy, while the state court, in a supple-

mental proceedings by Orteca against petitioner, might conclude otherwise.

Thus we hold that there is an actual controversy between petitioner and Orteca, and hence, that petitioner's complaint states a cause of action against the latter." [163]

Now, here would be the situation. The parties Gilmont are not indispensable parties to this proceeding but they are proper and that gave the plaintiff the option to bring them into this court and litigate the controversy, which the Supreme Court admits that they have between these parties, or seek this declaratory action here against the insured only to determine whether or not they had the obligation to go down there and defend that action under their policy. But, still that would not be *res judicata* to these parties Gilmont.

Therefore, the plaintiff would have to go to the state court, file its appearance by interpleader or intervention, and say, "No. These parties cannot recover because we have rescinded that contract and we anticipate that any judgment obtained herein under supplementary proceedings than these proceedings, they will levy against us. We want to be relieved of that possibility."

Now, you had your choice to litigate your matter here by bringing them in the controversy, which the Supreme Court says you have the right to do, or you have the choice to go to the state court. You elected to come to this court. Here you may litigate the controversy that you have with the defendants

Gilmont to the effect that they cannot seek supplementary proceedings in the event they obtain a judgment because you have no liability under the policy. That is the [164] course I will plot.

So here they may raise every defense that they could in the state court.

Do you want a little waiting spell before we continue?

Mr. Bosch: I would appreciate one.

The Court: By the way, Gentlemen, there is an expression in the close of that Supreme Court case on 270 which I am frank to say I don't know what the meaning of it is. You will recall they concluded:

"Thus we hold that there is an actual controversy between petitioner and Orteca, and hence, that petitioner's complaint states a cause of action against the latter. However, our decision does not authorize issuance of the injunction prayed by petitioner."

That has reference to the abatement or restraining of the proceedings of the state court as prohibited by Section 265 of the Judicial Code.

Mr. Vosburg: That would refer to without going against the assured he could still pursue his remedy against them, would be my interpretation, your Honor.

The Court: I just call that to your attention.

(Recess taken.) [165]

(At this point the jury entered the courtroom and the following proceedings were had in the presence of the jury:)

The Court: Call your witness.

(Testimony of Donald Eugene Dorris.)

Mr. Kennedy: I believe that Mr. Dorris was on the stand.

The Court: Very well.

(At this point Mr. Dorris resumed the witness stand.)

Mr. Kennedy: I would like to ask at this time, your Honor, that the deposition of Mr. Dorris be opened and published and made a part of the record.

The Court: Let the record show that there appears in the files of the cause a sealed envelope bearing the legend "Deposition of Donald Eugene Dorris," bearing this court clerk's stamp filed March 11th, '57. Will the Clerk please break the seal and remove the contents and mark the same for identification as Defendants' Exhibit 23?

(At this point a deposition of Donald Eugene Dorris taken February 21, 1958, was marked for identification as Defendants' Exhibit 23.)

Mr. Kennedy: May I proceed, your Honor?

The Court: You may.

Mr. Kennedy: Is there any objection to the deposition being published? [166]

The Court: Any objection?

Mr. Bosch: Oh. Excuse me, your Honor. No, your Honor.

The Court: It will be published and made a part of the record.

(At this point Defendants' Exhibit 23, previously marked for identification, was made a part of the record.)

(Testimony of Donald Eugene Dorris.)

Direct Examination—(Continued)

Q. (By Mr. Kennedy): Mr. Dorris, I believe we had just got to the point where you were an adjuster for Mayflower Insurance Exchange.

A. I believe that's correct.

Q. Is that correct? A. Yes.

Q. And I believe you testified that your immediate superior was the claims manager, Mr. Costa; is that correct? A. Yes.

Q. Mr. Costa is sitting in the back of the courtroom, is he not? A. That's right.

Q. Now, Mr. Dorris, when was this loss involving the automobile accident between Mr. McKenzie and Mr. Gilmont first assigned to you?

A. The actual date on that, I believe, was June the 14th.

Q. That was assigned to you by whom? [167]

A. Mr. Costa.

Q. What did you do after it was assigned to you?

A. Well, the first thing I did, as I recall—as near as my memory—as I can recall, I called Mr. Bucholz' office and talked with Mr. Bud Snyder over the phone.

Q. Excuse me. That's the Mr. Snyder who testified here?

A. Yes. That's right. And found out that there was a—that he didn't know where Mr. McKinzie was as far as where we could contact him. He could give me only the information that was given over

(Testimony of Donald Eugene Dorris.)

the phone to our claims clerk or the girl in the office that took the phone call.

Q. Well, did your company receive knowledge of this accident prior to June 14th?

A. I believe it came in on the 13th. That was taken by the girl on the 13th, I believe, over the phone.

Q. Do you know where that information came from?

A. As I understand, it came from Mr. Snyder.

Q. I see. Mr. Snyder first acquired the information?

A. That's right.

Q. All right. Go ahead with your conversation with Mr. Snyder.

A. It was very brief. I found out that Mr. McKinzie had a loan on the car or there was a mortgage on the car. I secured that information and I attempted to locate the loan company and I managed after two or three telephone calls to [168] locate the proper office and got ahold of a—I don't recall now whether it was at that time that I got ahold of the assistant manager of someone in that capacity—Mr. Pemberton or Mr. Bemperton, I am not sure of the name—and I asked if he knew of any information that would be pertinent to how we could get ahold of Mr. McKinzie or members of his family.

Q. Excuse me, Mr. Dorris. Did you acquire any copy of the application on or about that time or any information regarding coverage?

A. Application? You are referring to what, sir?

(Testimony of Donald Eugene Dorris.)

Q. To Mr. McKinzie's application for insurance.

A. No, sir.

Q. Did you acquire any information regarding coverage under the insurance policy?

A. Through the telephone call, a form which we call our C43 which is a coverage sheet was attached to the telephone report.

Q. Well, did you eventually, then, proceed to the Toledo area to investigate the accident?

A. Yes. That was on a Monday morning.

Q. What date was that?

A. I believe it was the 17th, if my memory serves me correctly.

Q. It was a Monday? A. Monday. [169]

Q. How long did you spend in the Toledo area?

A. May I excuse myself there? I went down on Sunday evening, actually, and I started to work about 8:00 o'clock on Monday morning in that area.

Q. How long did you stay down there?

A. I stayed there through the 18th, as near as I can recall.

Q. Two days, is that correct?

A. Two days. Monday and Tuesday.

Q. Would you describe generally your investigation?

A. Well, as I recall, the first thing on that morning I stopped at the—I can't recall the name of the garage where the Gilmont car was. That was merely by accident that I found the car there. I had no idea where the car was. I only knew that it was in the Toledo area.

(Testimony of Donald Eugene Dorris.)

I inspected the Gilmont car and noted the make and model, and so forth, and took pictures of the damage.

From there I went—I found out that Mr. McKinzie's car was at, I believe it is, Dixon Motors there in Toledo, and I went to Dixon Motors and inspected the Cadillac, Mr. McKinzie's car, at that point.

Q. Did you talk to the state police officers during the course of your investigation?

A. During the course of the investigation, yes. I believe it was on Tuesday that I talked to them.

Q. And what were their names, do you recall?

A. Weems. Sergeant Weems and Sergeant Colbert, I believe the names were.

Q. Sergeant Colbert?

A. Colbert. I may be wrong.

Q. Did you review the police reports—state police reports at that time? A. No, I did not.

Q. You did not review them? A. No.

Q. But you did talk to the police officers?

A. I did talk to one of the officers. And one of the officers was not there at the time. He was supposed to be back in a little later in the evening. So I waited there. And I discussed just offhand candidly with the officer that was there. He told me—I believe it was Sergeant Colbert had made out the report.

Q. Were they the investigating officers?

A. As I understand it, yes.

(Testimony of Donald Eugene Dorris.)

Q. And do I understand you just discussed it with them in an offhand manner?

A. With the officer that was there — present there, yes.

Q. And what about with the other officer?

A. When he came in I requested a copy or to give the police report and he said it had been mailed to Salem and that if I wanted to get a copy of it to write to Salem and I could [171] procure a copy of it there.

Q. Well, didn't you discuss his investigation, the facts of the investigation, in detail with him?

A. Not in detail, no.

Q. You did not?

A. No. He told me, I believe—I believe he told me he didn't have his book with him that they put the notes in and that he couldn't give me any facts regarding it.

Q. Did you talk to either Mr. or Mrs. Gilmont—

A. Yes.

Q. —at that time? Who did you talk to?

A. I talked with Mrs. Gilmont.

Q. Where was Mrs. Gilmont at that time?

A. She was in the hospital.

Q. What was the subject of your conversation?

Mr. Vosburg: May it please the Court, I think I am going to object to that. This inquiry should be limited to after September 3rd and not just what this man did in the course of his investigation. I object to it, your Honor, as not within the purview of your ruling.

(Testimony of Donald Eugene Dorris.)

The Court: Yes. I sustain the objection.

Q. (By Mr. Kennedy): After you completed your investigation in Newport, Mr. Dorris, what did you do thereafter in connection with your investigation?

A. Well, I'd have to think on that for a moment to know just [172] exactly what I had done. I returned to Portland and I suppose I made a preliminary report on the accident, as to the events of the accident.

Q. Now, then—— A. Pardon?

Q. Let me ask you this and maybe it will refresh your memory. Did you talk to Mr. McKinzie's—any of his neighbors or his landlady?

A. Later on during the course of the investigation——

Mr. Vosburg: If your Honor please, I object to this. This isn't limited—he should be limited to after September 3rd. And just that he talked to anybody has no bearing whatsoever on this case.

The Court: May I have the question?

(At this point Mr. Kennedy's last question to the witness and the portion of the witness' answer thereto were read by the Court Reporter.)

The Court: Well, I assume that's on your theory of obtaining information.

Mr. Kennedy: That's right. Reasonable notice.

The Court: You may proceed.

Q. (By Mr. Kennedy): Do you recall the question, Mr. Dorris?

(Testimony of Donald Eugene Dorris.)

A. Yes. I did go to the address of Mr. McKinzie. The actual—the actual date I don't recall. I went to the [173] address that was given to us and knocked on the door and no one answered. As I recall, there was a man nearby mowing the lawn or some such thing and I asked him if he knew Mr. McKinzie and he said he did and that his wife was the landlady. In other words, they were the landlords of Mr. McKinzie. And I talked with—he took me back and introduced me to his wife. And she informed me that Mr. McKinzie had been living there for some time and she volunteered certain information to me at that time, yes.

Q. What information did she volunteer to you?

A. Well, as to—Mr. McKinzie had been—taken the cure for Alcoholics Anonymous.

The Court: I don't think that has anything to do with the matter.

Mr. Vosburg: I still think, your Honor, I object to that and ask it be stricken and the jury asked—instructed to disregard it.

The Court: Members of the jury, the witness' statement as to—he said somebody volunteered the statement to him "McKinzie had taken the cure," is of no concern to us in connection with the rights of these parties. It is stricken from the record and please disregard it.

Q. (By Mr. Kennedy): Mr. Dorris, did you write a letter or make a request with the Department of Motor Vehicles for the driving records of Mr. McKinzie? [174]

(Testimony of Donald Eugene Dorris.)

A. I don't recall who it was to. I did write for a driving record.

Q. Do you remember about when you did that?

A. Approximately July 1st.

Q. Was that after or before your conversation or your attempt to locate Mr. McKinzie through his landlady?

A. After.

Q. It was after?

A. Yes.

Q. So that your attempt to locate him and any conversation you might have had was before your first request for his driving record?

A. That's right.

Mr. Kennedy: May I have those letters, counsel?

Q. While we are marking some of these exhibits, Mr. Dorris, did you attempt to contact Mr. McKinzie while you were in Newport during your investigation there?

A. I don't remember entirely. But it occurs to me that while in the area someone, I can't say who, informed me or, at least, led me to believe that Mr. McKinzie was in a Portland hospital. Now, I don't—

Q. That's the Veterans Hospital?

A. I don't know. There wasn't any mention of what hospital or anything.

Q. When did you first contact Mr. McKinzie, then? [175]

A. The actual date?

Q. Yes.

A. July the 26th.

Q. Where did you contact him?

A. At the Veterans Hospital here in Portland.

(Testimony of Donald Eugene Dorris.)

Q. At that time did you take a statement from him? A. I did.

Q. At that time did you take a proof of loss and a release for property damage? A. I did.

Q. Eventually did you issue a check in payment of the property damage? A. Yes, I did.

Mr. Kennedy: Do you have that proof of loss, by chance?

Q. Incidentally, Mr. Dorris, did you inquire with respect to whether Mr. McKinzie had a driver's license at the time that you talked to him?

A. No, I didn't.

Q. As I understand it, that was on July 26th?

A. As my memory serves me it was July the 26th.

Q. While we are still marking exhibits, Mr. Dorris, did you eventually contact the attorney or attorneys who were representing Mr. and Mrs. Gilmont and their minor children?

A. Yes. The date I don't know.

Q. The date you do not know? [176]

A. I don't recall the date, no.

Q. Did you ever discuss the aspects of liability or the possibility of delaying the filing of suit?

Mr. Bosch: Your Honor, we object to that testimony as to the discussion that might have been had with this particular adjuster and any attorney representing the defendants Gilmont. It does not go to the issue which was eliminated earlier by the Court?

Mr. Kennedy: Well, I think it goes to the question of prejudice, your Honor.

(Testimony of Donald Eugene Dorris.)

The Court: What was the question?

(At this point Mr. Kennedy's last question to the witness was read by the Court Reporter.)

The Court: I will sustain the objection to that, not because of your theory but on other grounds. If you claim that there were any overtures made by any person not to file suit there by changing their position, why, that's another thing. But the question to that is entirely different.

Q. (By Mr. Kennedy): Let me ask you directly, Mr. Dorris, did you ever request the attorney representing Mr. and Mrs. Gilmont and their minor children to delay filing suit?

Mr. Vosburg: Just a minute. Your Honor, I think the time limit should be objected to. Certainly the time limit should be in this question and I object to that on that ground. [177] There is no evidence this man has any authority to bind the company.

The Court: If counsel doesn't wish to lay the time foundation this witness will either answer Yes or No and then you can take the witness over on voir dire and ascertain what the time is. I can't dictate to counsel. I would suggest, however, that he change his question as to ascertaining the time element involved.

Mr. Kennedy: Well, it might have been any time, your Honor.

The Court: You don't know, in other words?

Mr. Kennedy: I think I have some information as to what time.

(Testimony of Donald Eugene Dorris.)

The Court: All right. You answer the question Yes or No.

The Witness: I did discuss it with an attorney, yes.

Q. (By Mr. Kennedy): Did you ever at any time—and we will limit this between June 8th, 1957, the date of the accident, and October 1st, 1957, which, I believe, was the date of the filing of this suit—request Mr. Pihl who was representing the Gilmonts to delay filing an action for damages against Mr. McKinzie?

The Court: Don't answer.

Mr. Bosch: If the Court please, the plaintiff objects to this question on the grounds, one, that there has been no authority—or, there has been no testimony to show that this [178] particular witness had any authority to bind the plaintiff; two, I think also that the time limit used in the expression—or, the question is considerably broader than would fall under the previous ruling of the Court.

Mr. Kennedy: Well—

Mr. Bosch: Now, I realize, first, on the first ground there has been no foundation of the authority of this witness to bind the company.

The Court: Is it your position that there was some definite action taken by the plaintiff one way or the other prior to filing the suit?

Mr. Kennedy: Is it my position, your Honor?

The Court: No. I am asking Mr. Bosch.

Mr. Bosch: Would you ask me again, your Honor?

(Testimony of Donald Eugene Dorris.)

The Court: Yes. For clarification's sake it is your contention that the plaintiff took some definite action concerning its position prior to the institution of this present suit?

Mr. Bosch: Yes, your Honor.

The Court: Well, then, you are correct.

Mr. Kennedy: What date, counsel, then? I can correct my question. You want the date and I am just trying to comply with your request. You give me the date and I will ask the question again.

Mr. Bosch: Certainly on the 23rd day of June a letter [179] was written advising the insured that the company then elected to consider the policy null and void.

The Court: All right.

Mr. Kennedy: 23rd day of June?

Mr. Bosch: September. Excuse me.

Mr. Kennedy: Do you want me to limit my question up until that date?

Mr. Bosch: If I understand the ruling of the Court before it would be—well, I am not telling you how to ask the question.

Mr. Kennedy: I will rephrase the question again, your Honor.

Q. Mr. Dorris, at any time between June 8th, 1957, which I understand was the date of the accident, and September 23rd, 1957, which I understand was the date that a letter was written to Mr. McKinzie, did you ever request Mr. Pihl, who was representing Mr. and Mrs. Gilmont and their minor children, to delay filing an action for damages for

(Testimony of Donald Eugene Dorris.)

personal injuries against Mr. McKinzie? Now, wait a minute.

Mr. Bosch: Your Honor, I renew my objection again to that question on the grounds, one, there is no evidence that this particular witness had any authority to speak for or bind the company in this particular respect.

The Court: What do you claim for it?

Mr. Kennedy: Well, I claim that it is a request to— [180] request to delay filing suit on the basis that they were investigating the accident and they had coverage, the question of negotiating. I will ask him what his authority is if that is the basis of the objection.

The Court: Well, he either had express authority or he had implied authority. Now, he said that he was adjusting. Ordinarily an adjuster has no authority whatsoever to determine whether or not the company is going to rescind a contract or take any steps on it.

Now, if you want to interrogate him on what his duties were and what he did in the field, why, maybe there is something to your position under implied authority.

Q. (By Mr. Kennedy): What were your general duties, Mr. Dorris, as an adjuster?

A. Investigation of all accidents and fires.

Q. Taking statements? A. Yes.

Q. Negotiating settlements with claimants?

A. Yes.

Q. Discussing settlement with attorneys?

(Testimony of Donald Eugene Dorris.)

A. Yes.

Q. Actual settlement of cases?

A. May I ask a question at this point?

Q. If you wish.

A. I would like to say this: that up until this point, [181] actually, I was acting in the capacity as a trainee and I had certain authority to act on those matters, yes.

Q. You had certain authority to act?

A. Yes, that's right. I would negotiate——

Mr. Kennedy: I submit the matter, your Honor. And my recollection is that there is some, at least, Oregon authorities on the question of an adjuster having general authority, having authority to bind.

The Court: I would like to see it.

Mr. Kennedy: I don't have it with me.

The Court: May I inquire, did you have authority to settle a case in the field or did you have to report to the home office?

The Witness: To a certain degree I did, yes.

The Court: To what extent?

The Witness: Well, a limit in dollars.

The Court: A limit in dollars?

The Witness: Yes.

The Court: In any of your discussions with any of the parties was there ever any activities came to——within your limits, discussion within your limits?

The Witness: Prior to that date I couldn't say.

The Court: Well, I don't see where you have shown any basis upon which this witness could do

(Testimony of Donald Eugene Dorris.)

anything but speculate to the greatest degree as to what his authority was. [182]

Mr. Kennedy: I take it that the objection is sustained?

The Court: You are right.

Q. (By Mr. Kennedy): Now, Mr. Dorris, certain exhibits have been handed to you commencing with Defendants' Exhibit No. 24 for identification. Is that a letter that you addressed to the Oregon State Police, Bureau of Records, Salem, Oregon, dated July 2nd, 1957? A. Yes.

Q. Or, rather, a copy?

A. It's a copy, yes.

Mr. Kennedy: Yes. Defendant will offer Defendants' Exhibit 24.

Mr. Bosch: No objection.

The Court: It will be received.

(At this point a letter dated July 2nd, 1957, from D. E. Dorris to Oregon State Police, Bureau of Records, Salem, Oregon, previously marked for identification, was received in evidence as Defendants' Exhibit 24.)

Q. (By Mr. Kennedy): Would you read that letter, Mr. Dorris?

A. The address starts out with the address on here: "1101 S.E. Salmon, Portland, Oregon. July 2, 1957. Oregon State Police, Bureau of Records, Salem, Oregon. Re: Our insured Arthur A. McKinzie Accident of 6-8-57 Policy 174380 [183] Gentlemen:

(Testimony of Donald Eugene Dorris.)

The writer requests a search of your records for information regarding the above captioned insured's driving record as to dates and other information regarding previous accidents.

The last known address of the insured, Arthur A. McKinzie, was 4619 S.W. Viewpoint Terrace, Portland, Oregon. He has been driving a 1951 Cadillac coupe, Motor No. 516262287, license No. 4G2710, title No. E1763215 purchased 4-19-57.

Any information you can give us regarding the above captioned insured driver would be appreciated, and please enclose a bill for your services.

Very truly yours, D. E. Dorris, Claims Department."

And down below it is signified "DED" by "wa."

Q. Now, the date of that letter was—is that July 2nd? A. July the 2nd, yes, sir.

Q. Now, the next letter underneath there is Defendants' Exhibit 25. A. 25, correct.

Q. Would you please describe what that letter is?

The Court: That hasn't been received yet.

Mr. Kennedy: Excuse me, your Honor.

Q. That letter, as I understand it, is the letter addressed [184] to the home office, to save time. At this time I will offer it in evidence.

The Court: Any objection?

Mr. Bosch: No objection.

The Court: It will be received.

(At this point a letter dated July 11th, 1957, from Edward M. Syring to Mayflower Insur-

(Testimony of Donald Eugene Dorris.)

ance Exchange, previously marked for identification, was received in evidence as Defendants' Exhibit 25.)

Q. (By Mr. Kennedy): Would you please describe Exhibit 25?

A. This is a letter, original copy, from the Oregon State Department of Motor Vehicles, Salem, Oregon, dated July the 11th, 1957, case No. 55-5427. It is addressed to the Mayflower Insurance Exchange, 2717 Third Avenue, Seattle 1, Washington.

"Dear Sir: Acknowledgment is made of your request for an abstract of driving record on Arthur A. McKinzie.

Inasmuch as there is a charge of \$1.00 for a certified abstract of driving record, we are holding your request pending receipt of the aforementioned fee.

Very truly yours, James F. Johnson, Director, by Edward M. Syring, Manager Financial Responsibility." [185]

Q. The date of that letter is July 11th?

A. July 11th.

Mr. Kennedy: Now, at this time, defendant will offer Defendants' Exhibit 26.

The Court: Any objection?

Mr. Bosch: What is it?

Mr. Kennedy: 26 is the copy of the letter from the home office addressed to the State of Oregon, Department of Motor Vehicles.

Mr. Bosch: No objection.

The Court: Did he enclose the dollar there?

(Testimony of Donald Eugene Dorris.)

Mr. Kennedy: I don't believe so, your Honor. We have to cut costs somewhere.

Q. Would you please describe that letter?

A. This is a carbon copy of a letter signed by Mr. R. T. Carlson, underwriting department.

Q. Is that from Seattle?

A. Presumably, yes.

Q. Go ahead.

A. Do you want me to read it? It's dated July 18th, 1957, State of Oregon, Department of Motor Vehicles, Salem, Oregon, Policy No. 174380, Re: Arthur A. McKinzie. Your Case 55-5427.

"Gentlemen: Regarding your letter of July 11, we find no record of anyone in this office requesting the abstract of driving record on Arthur A. McKinzie.

We would appreciate your giving us the name of the person requesting such report, as undoubtedly someone did, so that we may refer this to the proper person.

Thank you for your cooperation.

Very truly yours, R. T. Carlson, Underwriting Department," and then there is a — inked in here under remarks it says "Claim department in Portland has this claim file No. 1-23651." Now, what date that was on there or not, I don't know.

Mr. Kennedy: Thank you, Mr. Dorris. Defendant will offer Defendants' Exhibit No. 27 which is an original letter dated July 25th, 1957, addressed to the Seattle office of Mayflower Insurance Exchange from the Department of Motor Vehicles.

Mr. Bosch: No objection.

(Testimony of Donald Eugene Dorris.)

The Court: It will be received.

(At this point a letter dated July 25, 1957, from Edward M. Syring to R. T. Carlson, Underwriting Department, Mayflower Insurance Exchange, previously marked for identification, was received in evidence as Defendants' Exhibit 27.)

Q. (By Mr. Kennedy): Would you please describe and read Exhibit 27? [187]

A. This is a——

Q. I hate to put you to all this work.

A. Yes. This is on a letterhead from the State of Oregon, Department of Motor Vehicles, Salem, Oregon. It's dated July 25th, 1957, Re: 55-5427. It's directed to Mr. R. T. Carlson, Underwriting Department, Mayflower Insurance Exchange, 2717 Third Avenue, Seattle 1, Washington.

“Dear Sir: In reply to your letter of July 18th relative to an abstract of driving record on Arthur A. McKinzie, please be advised that this request was made by D. E. Dorris, Claims Department.

We are sorry our letter failed to give this information.

Very truly yours, James F. Johnson, Director.”

And it is signed by Mr. Edward Syring, again. Whatever—and on this—by the way, this is from the Financial Responsibility Department. He is the manager. On this there is in red ink—it says: “To: Portland Claims” line “R.C.,” which, I presume, is Mr. Ray Carlson. Dated 7/27/57. And down below here is a comment to me, “Don” line drawn under-

(Testimony of Donald Eugene Dorris.)

neath "the State wrote us and said \$1.00, please. We wrote to find out who ordered it. No record here." And R.C. again.

Q. Now, Mr. Dorris, I will ask you to look at Defendants' Exhibit No. 28 for identification, and I will ask if that's a letter. [188]

The Court: Are you offering that exhibit?

Mr. Kennedy: I will just have him identify it first, your Honor.

The Court: Very well.

Q. (By Mr. Kennedy): Is that a letter you wrote to the State of Oregon?

A. It is a copy of a letter.

Q. Incidentally, what was the date of the last exhibit, that letter addressed to Mayflower from the State of Oregon?

A. Addressed to Mr.—this was 25—that's Exhibit No. 27. That's July the 25th.

Mr. Kennedy: All right. Defendant will offer Defendants' Exhibit 28.

Mr. Bosch: No objection.

The Court: It will be received.

(At this point a letter dated August 20, 1957, from D. E. Dorris to State of Oregon, Department of Motor Vehicles, Salem, Oregon, previously marked for identification, was received in evidence as Defendants' Exhibit 28.)

Q. (By Mr. Kennedy): Would you read this letter that you wrote to the Department of Motor Vehicles, then, Mr. Dorris? First, what is the date of it?

(Testimony of Donald Eugene Dorris.)

A. The date on this is August the 20th, 1957. This is a [189] carbon copy of a letter, our address at the top, 1101 S. E. Salmon, Portland, Oregon. August the 20th, 1957.

“State of Oregon, Department of Motor Vehicles, Salem, Oregon. Re Your file 55-5427. Our insured Arthur A. McKinzie. Accident of 6-8-57. Policy 174380.

Attention: Edward M. Syring, Financial Responsibility.

Gentlemen: It appears that there is some confusion in this matter.

On 7-18-57 the writer requested an abstract of the driving record of Mr. Arthur A. McKinzie, our insured. Please advise if this information is available.

If the information is available please forward to this office with a copy of your billing.

Very truly yours, D. E. Dorris, Portland Claims Department.”

Q. And then did you receive a response to that letter? I direct your attention to Defendants' Exhibit for identification No. 29.

A. I don't have it here.

Q. You do not have it there?

The Court: What was the date, please?

The Witness: The date of this was August the 20th. [190]

The Court: August 20th.

Mr. Kennedy: Now, I hand you—or, you have Defendants' Exhibit No. 29.

(Testimony of Donald Eugene Dorris.)

Q. Is that the response that you received of the Motor Vehicle—

A. Could I read it over here?

Q. Go ahead and read it over.

A. All right.

Mr. Kennedy: Well, I will offer it.

Mr. Bosch: No objection.

The Court: It will be received.

(At this point a letter dated August 23, 1957, from Edward M. Syring to D. E. Dorris, previously marked for identification, was received in evidence as Defendants' Exhibit 29.)

Q. (By Mr. Kennedy): Would you read it?

A. Yes. Just a moment. This is, once again, on the letterhead from the State of Oregon, Department of Motor Vehicles, Salem, Oregon, dated August 23rd, 1957. File No. 55-5427. Then it is directed to me, D. E. Dorris, Mayflower Insurance Exchange, 1101 Southeast Salmon, Portland, Oregon.

"Dear Mr. Dorris: Acknowledgment is made of your letter of August 20, 1957, in which you request an abstract of driving record for Arthur A. [191] McKinzie.

Inasmuch as your check was not included in your request, it will be necessary that you forward us \$1.00 which is the charge for each driving record. We have been holding your request pending receipt of aforementioned fee.

Very truly yours, James F. Johnson, Director,"
signed by Mr. Edward Syring.

(Testimony of Donald Eugene Dorris.)

Q. What is the date of that letter?

A. That is August the 23rd.

Q. Now, you have in your hand Defendants' Exhibit No. 30? A. That's right.

Mr. Kennedy: I will offer that.

Mr. Bosch: No objection.

The Court: It will be received.

(At this point a document purporting to be a receipt from Department of Motor Vehicles, previously marked for identification, was received in evidence as Defendants' Exhibit 30.)

Q. (By Mr. Kennedy): Now, that's the receipt for the dollar, is it not, Mr. Dorris?

A. That is right.

Q. What is the date of that receipt?

A. The date on it is September 4, 1957, for \$1.

Q. Did you write a letter of transmittal with your check for a dollar?

A. I don't recall that, sir.

Q. Now, Mr. Dorris, I assume that, then, you received the abstract of the driving record?

A. The same day I received this (witness brandishes document).

Mr. Kennedy: 30 was received, was it not?

The Court: Yes.

Q. (By Mr. Kennedy): Now, Mr. Dorris, I am handing you for identification Defendants' Exhibit, I believe it is, 31, the proof of loss. A. Yes.

Q. I will ask you, is that the proof of loss and release that you obtained from Mr. McKinzie?

(Testimony of Donald Eugene Dorris.)

A. Yes; this is the original.

Mr. Kennedy: Defendant will offer Defendants' Exhibit 31.

Mr. Bosch: Your Honor, we will object to the introduction of that into evidence on the grounds that that has nothing to do with the matter which the Court has heretofore ruled on.

The Court: May I see it, please?

(At this point the witness handed document to the Court.)

Mr. Bosch: I would like to invite the Court's attention to the Plaintiff's Exhibit No. 3, the loss payable endorsement.

The Court: Defendants' Exhibit 3? [193]

Mr. Bosch: That is the copy of the policy. Plaintiff's, your Honor. That's the plaintiff's exhibit, the policy. The loss payable endorsement.

The Court: I see it is almost five o'clock. Do you have any other matters that you can go into so I can deal with this, or are you—

Mr. Kennedy: I don't believe I have anything further except, of course, the following exhibit, your Honor.

The Court: Well, members of the jury, I see it is right at five o'clock. We will recess for the night-time. Recall the admonition of the Court. Do not discuss the matter among yourselves or permit any person to discuss it with you.

Tomorrow morning at 9:30, please. 9:30 tomorrow morning.

(At this point the jury left the courtroom and the following proceedings were had out of the presence of the jury:)

Mr. Bosch: If the Court please, on this point I cited some cases. It's on the foot of the second page.

The Court: Yes. Now, you say look at the loss payable clause.

Mr. Bosch: I don't have a copy, your Honor. But it's my recollection that the endorsement for the mortgagee's benefit makes it, at least under these circumstances, obligatory on the insurance company regardless of any defenses it [194] might have against the named insured. It is the usual form of loss payable endorsement. And I think along towards about the third paragraph or so it provides——

The Court: Well, let's see what we have got here. I am reading, counsel, from what purports to be the automobile loss payable endorsement attached to the copy of the policy.

“With respect to the interest of the Lien-holder named on the face of Policy Declaration.

it's successors,” et cetera, “Loss or damage, if any, to the property described in this policy shall be payable firstly to the Lien-holder and secondly to the insured, as their interests may appear, provided nevertheless that upon demand by the Lien-holder upon the Company for separate settlement the amount of said loss shall be paid directly to the Lien-holder to the extent of its interest and the balance, if any, shall be payable to the insured.”

All right. Now, in this case we have pay jointly to the insured.

Mr. Bosch: The draft was made that way, your Honor. The funds, I am prepared to prove, never found their way to the insured.

The Court: Well, I think my present thought is that is a burden of the defendant in connection with this matter. [195]

“2. The insurance under this policy as to the interest only of the Lien-holder shall not be impaired in any way by any change in the title or ownership of the property or by any breach of warranty or condition of the policy, or by any omission or neglect, or by the performance of any act in violation of any terms or conditions of the policy or because of the failure to perform any act required by the terms or conditions of the policy or because of the subjection of the property to any conditions, use or operation not permitted by the policy or because of any false statement concerning the policy or the subject thereof, by the insured or the insured’s employees, agents or representatives; whether occurring before or after the attachment of this agreement, or whether before or after the loss; Provided, however, that the wrongful conversion, embezzlement or secretion by the Purchaser, Mortgagor, or Lessee in possession of the insured property under mortgage, conditional sale contract, lease agreement, or other contract is not covered under this policy * * *”

I see your point. Haskins against Greene, Meader against Farmers Mutual Fire Relief Association, Prather against National Fire Insurance Company, State Farm Mutual, which is a Ninth Circuit case.

Mr. Bosch: That State Farm case is right on point, your Honor.

The Court: That's the Ninth Circuit.

Mr. Bosch: I don't think it is the Ninth Circuit, your Honor. It's cited up above at the top.

The Court: I see. It is a Federal Supplement.

Mr. Bosch: It's a District Court case. It was never appealed.

The Court: "Where the policy provides for payment thereof to the mortgagee despite any breaches of conditions by the mortgagor, and for subrogation thereupon to the rights of the mortgagee, payment to the mortgagee made pursuant thereto is not a waiver by insurer, particularly where the mortgagor, to his prejudice, was not led to rely on payment."

Mr. Kennedy: May I make my position just very briefly clear, your Honor? There was a release. If the Court will read what is called the proof of loss, it is a release. There was a release and proof of loss taken from Mr. McKinzie, not from City Finance Company. They also saw fit to draw a check payable to both Mr. McKinzie and the City Finance Company to be offered—

The Court: That's pursuant to the terms of the policy.

Mr. Kennedy: Well, I am saying it's some evi-

dence. They can argue the policy and that's all I claim for it, your [197] Honor.

The Court: All right. If you can show that any part of this check came into the hands of the defendant assured I could bear with you.

Mr. Kennedy: Well, I think the documents speak for themselves there, the ones that paid him. If that isn't true they ought to produce him. They are the ones that took the release from him. They are the ones that made him a joint payee. All we have is counsel's statement that "I am sure he didn't get any." I don't know. Let them call him.

The Court: Oh. You don't know?

Mr. Bosch: Your Honor, what I said—when I said I was prepared—I said, "I am prepared to subpoena an officer from City Finance." I have only at this time a photostatic copy of their records. I am prepared to put on testimony, if the Court so wishes. The burden is not yet on—

The Court: I can only do this: The only power the Court has to do it—now, a phone call would satisfy counsel as to whether or not any part of this money got into the hands of the insured. So, in the morning if counsel aren't in a position—I mean, all counsel are not in a position to stipulate in the record that either the insured did or did not receive funds from the proceeds of this check to his benefit on account of the loss of his automobile and the amount of any such payment, if there was a payment, then, I [198] shall assess costs against the person whom the evidence goes against.

Mr. Kennedy: I can possibly simplify this. If

Mr. Bosch has firsthand knowledge that he did not receive any funds as a result of this and if Mr. Bosch tells me that, I will, of course, stipulate to it.

The Court: Very well.

Mr. Bosch: May I say what I know, your Honor? I don't know firsthand. I wasn't there when the check was delivered. But I do know——

The Court: I wonder this: Are you in a position to represent to counsel that you hold there a photostatic copy of these people's records?

Mr. Bosch: I am, your Honor. And I will furnish it.

The Court: Let him see it.

Mr. Kennedy: Your Honor, defendant will withdraw the last two exhibits in the controversy.

The Court: Thank you. All right. Let's recess.

(At this point court adjourned at 5:10 P.M.)

Morning Session

9:30 o'clock a.m., Portland, Oregon

The Court: Defendant's next witness.

Mr. Kennedy: Mr. Dorris was on the stand, your Honor, and I finished my direct examination.

The Court: Any cross examination, Mr. Bosch?

Mr. Bosch: If you please, your Honor.

The Court: Very well, please take the stand.

DONALD EUGENE DORRIS

produced as a witness in behalf of the defendants, having been previously duly sworn by the Clerk, resumed the stand and testified as follows:

Cross Examination

Q. (By Mr. Bosch): How long have you been employed by the plaintiff, Mr. Dorris?

A. Since April of '57.

Q. April of '57. That would be the same month that Mr. McKinzie made his application?

A. Yes, I believe so.

Q. Come June of that same year you would have worked for the company, April, May, about three months, two months, two or three months?

A. Yes, sir.

Q. During those months that you worked for the plaintiff, [200] what were your duties?

A. Mainly, I was working under the supervision of another adjuster and, in other words, training as adjuster with him.

Q. Well, did your duties cover the entire field of adjusting? In other words, property damage, personal injury, the whole broad field?

A. Yes.

Q. This particular file, the one that was given to you after the accident was reported some time after June 7th, how many files, personal injury files, had you had occasion to adjust yourself before that was given to you?

Mr. Kennedy: Object to this line of questioning, your Honor. Has no relevancy for the—

(Testimony of Donald Eugene Dorris.)

The Court: May I have the question?

(Last question read back by the court reporter.)

The Court: Well, all of the intentions of defendants have been removed from the case, with the exception of the one that is at issue at the moment. I think I understand your premise you are asking about. I don't think it makes any particular, I don't think you will arrive at the experience by asking how many files he has.

Mr. Bosch: I won't pursue it further, your Honor.

The Court: Ask him about the experience as an adjuster. You can do that. You can do so, but how many files I don't believe is pertinent. [201]

Mr. Bosch: I have no further questions.

Mr. Kennedy: Defendant will call Mr. Kosta.

MELVIN KOSTA

produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Kennedy): Your name is Melvin Kosta? A. That's correct.

Q. Mr. Kosta, you are the Claims Manager for Mayflower Insurance Exchange in this particular area, are you not? A. That's correct.

Q. You are also an attorney duly admitted to practice in the state and in this Court, are you not?

(Testimony of Melvin Kosta.)

A. That's correct.

Q. Now, Mr. Kosta, how long have you been Claims Manager for Mayflower?

A. Since May 6, 1957.

Q. And the adjustment of the claims is under your direct supervision in this particular area?

A. That's correct.

Q. On June 8, 1957, how many adjusters, excluding yourself, as Claims Manager, were there working in the Portland office? A. Four.

Q. Were all four adjusters, did they have, were they assigned to adjust losses more or less equally, or did you make some distinction or difference between them? [203]

A. It depended on the experience or the different categories in the adjusting, as far as injury files or physical damage files, and it depends on the experience of the individual.

Q. I understand in this case—correct me if I am wrong—you assigned Mr. Dorris to investigate the personal injury aspects and the property damage aspects of the automobile collision between the automobile of Mr. McKinzie and the Gilmonts?

A. Correct: He was the only one that was available to go at that time.

Q. Do you recall when you assigned this particular file to him?

A. No, I do not recall, but it was just shortly after the accident occurred. I cannot give a specific date.

(Testimony of Melvin Kosta.)

Q. Now did you have occasion to discuss this particular case with Mr. Dorris thereafter?

A. Well, it's my particular job to supervise the investigations and the handling of claims, and there were some discussions between Mr. Dorris and myself regarding this particular case.

Q. In other words, you were supervising this claim also, were you not?

A. To a certain extent, yes.

Q. Your general duties are to supervise them?

A. That's correct.

Q. You were supervising this claim along with the other claims?

A. That's correct.

Q. Mr. Kosta, do you recall a conversation with Mr. Dorris or receiving some information from Mr. Dorris, I would say around about July 1st, regarding his discussions with either a lady or a neighbor or Mr. McKinzie?

Mr. Bosch: If the Court please, I make this objection, that the answer so framed does not permit us to know whether this information will fall——

The Court: It will fall, if it falls within the same line as the last one, I think you are out of bounds.

Mr. Kennedy: It calls for a yes or no answer, your Honor.

The Court: I'll bear with you on it. It's either yes or no.

The Witness: Would you ask the question again or would you read it back, please?

(The last question read back by the Court Reporter.)

(Testimony of Melvin Kosta.)

The Witness: Yes.

The Court: Purely hearsay.

Mr. Kennedy: I'm sorry, your Honor.

The Court: I say that's hearsay.

Mr. Kennedy: Both employees of the plaintiff, your Honor. [205]

The Court: What right does this plaintiff have on cross examination of a person who is supposed to have made the statement? If it's along the same lines as the question the Court ruled on yesterday, you are out of bounds, Mr. Kennedy.

Mr. Kennedy: Very well, your Honor.

Q. (By Mr. Kennedy): Mr. Kosta, did you apprise the State of Oregon for a motor vehicle driving report? A. I did not myself, no.

Q. Did you direct Mr. Dorris to do so?

Mr. Bosch: Your Honor, again it's hearsay, and I think the record has previously been put in here, the series of letters that clearly showed——

The Court: It wasn't the question. He asked if this man directed him to do that. You may answer.

The Witness: No, I did not.

Q. (By Mr. Kennedy): You did not?

A. No.

Q. Mr. Kosta, in the regular course of your duties as Claims Manager do you write to parties involved in an accident for various information?

A. You mean personally?

Q. Yes.

A. After I take over the specific supervision of

(Testimony of Melvin Kosta.)

a particular file, yes. But up until the time the file is turned over to [206] me for actual handling, I do not do the corresponding myself, no.

Q. Mr. Kosta, Mr. Price is handing you what has been marked as defendants' Exhibit No. 33 for identification. Did you write that letter to Mr. and Mrs. Gilmont, or whoever it was to?

A. I did not write this letter. This is a form letter that's sent over my signature. I did not sign the letter.

Q. You did not sign it? A. No, I did not.

Q. Do you know who did sign it?

A. The initials S.R. at the bottom, I presume a secretary in the office by the name of Shirley Robinson, I believe, signed that.

Q. Had you given her authority to sign your name?

A. There is certain correspondence in the office that does go out over my signature in which the secretaries sign, yes.

Q. Is that one of the cases? A. Yes.

Mr. Kennedy: We'll offer——

Mr. Bosch: May I inquire the date of that letter?

The Witness: June 13, 1957.

Mr. Bosch: Clearly falls without the scope of our issue, your Honor. June 13th is about two days after the notice of the accident was given to the company. I think there is no [207] proof at this stage that the company had any knowledge of any misrepresentation at this date, your Honor.

The Court: What do you claim for the letter?

(Testimony of Melvin Kosta.)

Mr. Kennedy: I claim at that time they commenced to negotiate with Mr. and Mrs. Gilmont.

The Court: Very well, it will be received. It is for the jury to determine whether or not defendant had any notice concerning their contentions now.

Mr. Kennedy: Thank you, your Honor.

(At this point defendants' Exhibit 33, previously marked for identification, was received in evidence.)

Q. Now, Mr. Kosta, I'll hand you plaintiff's Exhibit 8, which has been received into evidence, which I understand is a letter that you wrote to Mr. McKinzie on September 23rd of 1957, is that correct? Or rather, it's a copy of a letter.

A. That's correct, yes.

Q. Did you write that letter? A. Yes.

Q. You dictated it yourself?

A. As I recall, I did.

Q. Let me ask you this, Mr. Kosta. At that time was your investigation complete regarding this accident?

A. What particular phase of the investigation are you referring to? [208]

Q. All phases of it.

A. I would say substantially, yes.

Q. Would you read that letter, Mr. Kosta?

The Court: It hasn't been offered yet, has it?

Mr. Kennedy: It's been received, your Honor.

The Court: I beg your pardon. What was the number of it?

(Testimony of Melvin Kosta.)

Mr. Kennedy: It's 9, isn't it, Mr. Kosta?

The Witness: Exhibit 8. Marked received. This is a copy of a letter directed to Arthur McKinzie, in care of the Veterans Hospital, Portland, Oregon, under date of September 23, 1957.

"Dear Mr. McKinzie:

In re Mayflower Policy No. 174380.

Enclosed is our check made payable to your order in the sum of \$20.00 which represents the full premium paid by you on the above-captioned policy from the date of issue, April 16, 1957.

On April 16, 1957, you signed an Applicant's statement in which you answered in the negative questions as to whether your driver's license had been revoked or suspended and whether you had received any driving charges, citations, or fines (not parking) within three years prior to the date of the application. During the course of the investigation made subsequent to the accident which you had on June 8, 1957, we have learned from the [209] Department of Motor Vehicles of Oregon that on February 16, 1957, your driver's license had been suspended for an additional year and that this suspension was still in effect on April 16, 1957. Our investigation has also disclosed that you were convicted in the District Court of the State of Oregon for the County of Benton under date of February 14, 1956, of the traffic offense of 'no muffler.' If the questions put to you on your Applicant's Statement had been truthfully answered we would not have issued the above-captioned policy

(Testimony of Melvin Kosta.)

to you, and because of these misrepresentations we hereby elect to rescind the coverage from the date of issuance, to-wit, April 16, 1957."

Signed: "Mayflower Insurance Exchange," by myself.

Q. (By Mr. Kennedy): The misrepresentations that you referred to were the fact that he did not have his driver's, an Oregon driver's license at the time that he applied for the insurance, and the fact that he was convicted of the traffic offense of no muffler?

Mr. Bosch: If the Court please, I think the letter which Mr. Kosta read speaks for itself.

Mr. Kennedy: Very well, I withdraw the question, your Honor.

Q. (By Mr. Kennedy): Now at that time did you forward a check to Mr. McKinzie in the amount of \$20.00? [210] A. That's correct.

Q. What was the purpose of forwarding that check to him?

A. That was the premium that he had paid.

Mr. Kennedy: That's all.

The Court: Cross examine.

Cross Examination

Q. (By Mr. Bosch): Mr. Kosta, do you recall after this comedy of errors that your office, the Seattle office, and Salem, when you finally received the information up from Salem as to Mr. McKinzie's driving record?

A. As I recall, it was sometime in September.

(Testimony of Melvin Kosta.)

Q. Now that letter which you have just read to the jury dated September 23, I think, you had had the information then from the Salem office, Department of Motor Vehicles, as to Mr. McKinzie's driving record, is that correct?

A. That's correct.

Q. At that time did you know about his driving record in the State of California?

Mr. Kennedy: Just a moment. I object to that, your Honor, on the grounds they are bound by the letter of rescission. I refer the Court to the case of Ward vs. Queen City, 69 Ore. 347, 122, Ore. 527.

Mr. Bosch: Both of those cases, as I recall, hold that a person once setting grounds on which they intend to rescind [211] the contract are bound by those, and they can't set up others if they know of other grounds at the time they make their election.

The Court: That's correct.

Mr. Bosch: You don't waive what you don't know.

The Court: May I have the question?

(The last question read back by the court reporter.)

The Court: You may answer.

The Witness: No.

Q. (By Mr. Bosch): There was some period of time from the time you got your information from the State of Oregon until you got your draft of a letter to Mr. McKinzie and advised him that you were going to rescind?

A. That's correct.

(Testimony of Melvin Kosta.)

Q. Tell the Court what happened in the interim between the time your office first had notice of the vision of his records and the time you notified him you intended to rescind the contract. Explain to the jury exactly what you did and what the company did.

A. I might first state that questions of coverage involving policies are home office or questions to be submitted to the home office for decision. I have no authority to deny coverage on any policy. The facts are to be accumulated and sent to our home office, and they are the ones that make the decision. Which was what took place in this particular case. [212] And after I had corresponded and had conversations with my home office, thereafter conferred with Mr. Bosch's office. As I recall, by telephone.

Q. Mr. Kosta, was the ultimate decision then to rescind this contract and commence this particular suit preparatory judgment one of policy for the home office, was that the decision for the home office to make?

A. The question of deciding as to whether or not coverage should be rescinded was the decision and the policy of the home office.

Q. As soon as that decision was made you notified Mr. McKinzie of that decision?

A. That's correct.

Mr. Bosch: That's all.

The Court: Any redirect?

(Testimony of Melvin Kosta.)

Mr. Kennedy: Could I have just one second, your Honor?

The Court: Yes, indeed, you may.

Redirect Examination

Q. (By Mr. Kennedy): Didn't you give your home office some advice with regard to this matter?

A. I am a practicing attorney. Yes, I did give them some advice.

Q. It wasn't solely the decision of the home office?

A. I have no control of decisions they make. [213] Whatever advice I may have given them would actually ultimately have no effect on their decision itself.

Q. In other words, it wasn't a case of you didn't do anything about it. It was a case where you corresponded with the home office and reached sort of a joint conclusion, did you not?

A. Well, as Claims Manager it is necessary for me to give them some information and an opinion as to what I think.

Q. You advised them to forward the check in the amount of \$20.00 to him, didn't you?

A. As I recall, I think I did.

Mr. Kennedy: That's all.

The Court: That's all, sir, you may step down. Defendants' next witness.

Mr. Kennedy: Defendant will call Sergeant William J. Colbert. [214]

WILLIAM J. COLBERT

produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Kennedy): Your name is William J. Colbert? A. Yes, sir.

Q. What is your occupation or profession, Mr. Colbert?

A. I'm sergeant of the Oregon State Police, stationed at Newport, Oregon.

Q. Are you in charge of that particular office?

A. I am in charge of Lincoln County and the western half of Lane County.

Q. How long have you been a member of the State Police? A. Nineteen years.

Q. Did you have occasion to investigate an automobile accident which occurred on June the 8th, 1957, near Toledo, Oregon, between automobiles operated by a Mr. McKinzie and an automobile operated by Mr. Gilmont? A. Yes, sir.

Q. And did you later, Sergeant, prepare a report of the accident? A. Yes, sir.

Q. Now, Sergeant, do you recall at your office Mr. Donald Dorris, who sits in the back of the courtroom, contacting [215] you regarding the facts of the accident or the report?

A. No, I don't.

Q. You see quite a few people, don't you?

A. Yes, sir.

(Testimony of William J. Colbert.)

Q. And quite a few, you prepare quite a few reports, is that correct? A. Yes, sir.

Q. Would you describe generally what you do with the reports that you prepare?

A. We prepare a report and send the original and one copy to Salem and, before July of '57 we kept all copies of the accident reports that we made for our files.

Q. On this particular occasion did you keep a copy of the report? A. I did, yes, sir.

Q. Do you know when you forwarded the original report to Salem?

A. I believe it was on June the 13th.

Q. Do you have a copy of the report with you?

A. I have, yes, sir.

Mr. Kennedy: Do you have any objection to his referring to it?

Mr. Bosch: I can't keep him from referring to it.

Q. (By Mr. Kennedy): Would you be able to tell by looking at your copy of the report, Sergeant, when you forwarded the original to Salem? [216]

A. Well, I would say on June 13th.

Q. But you retained that copy?

A. Yes, sir.

Q. Now, Sergeant, on that, on the original and on your copy of the report did it indicate that Mr. McKinzie did not have an Oregon driver's license?

Mr. Bosch: Object to that, your Honor. It has not been introduced in evidence. He can speak from his own recollection and investigation.

(Testimony of William J. Colbert.)

The Court: He may use the report to refresh his memory, if it does. You may inquire.

Q. (By Mr. Kennedy): Do you have a recollection, Sergeant, as to whether in the report it is stated that Mr. McKinzie did not have an Oregon driver's license? A. Yes, sir.

Q. It did so state? A. It did so state.

Mr. Bosch: I don't see what the connection is between this and any testimony previously put in here which would tie this knowledge on the part of the plaintiff.

Mr. Kennedy: Your Honor, it's the position of the defendant that the plaintiff in this case is seeking to rescind this insurance contract, and when they are seeking to rescind, if they acquire knowledge of any information or [217] of any fraud in the application, they are obligated as a substantive matter to rescind immediately, and any delay—

The Court: Your position is that you intend to connect this witness up with the plaintiff, the testimony of this witness?

Mr. Kennedy: I intend to show by Sergeant Colbert that the report itself stated that Mr. McKinzie did not have a driver's license, that Sergeant Colbert of course knew that, and that Mr. Dorris, the adjuster, talked to Sergeant Colbert and if he asked him for the report, he would have received that copy of the report.

Mr. Bosch: There is no evidence whatsoever, your Honor, at this stage, at least, that Mr. Dorris asked for it, knew it was available.

(Testimony of William J. Colbert.)

The Court: All I did was ask Counsel if he represented to us that he intended to connect up this information with the plaintiff.

Mr. Kennedy: Mr. Dorris testified, it is my recollection that Mr. Dorris testified that he asked the Sergeant for the report. The Sergeant told him it was not available because he had sent it to Salem.

The Court: All right. How does that bind the plaintiff?

Mr. Kennedy: Well, it wasn't, the copy of the report was available to him. That's what I intend to show.

The Court: I thought you just said the Sergeant [218] told him it had to go to Salem. You mean he should have written to Salem to get it?

Mr. Kennedy: No. He retained a copy of the report which was available, your Honor.

The Court: All right, let's get the cart in front of the horse for a while. Ask him what conversation he had with Dorris and we'll find out.

Q. (By Mr. Kennedy): Do you recall any conversation with Mr. Dorris, Sergeant?

A. No, I don't.

Q. What is your usual practice with respect to disclosing the contents of the police reports to adjusters or attorneys inquiring?

Mr. Bosch: If the Court please, I don't think the usual practice is relevant. He testified he had no conversation, or recalls none, with Mr. Dorris.

The Court: Didn't recall. The objection will be sustained.

(Testimony of William J. Colbert.)

Q. (By Mr. Kennedy): Sergeant, do you know how long Mr. McKinzie was in the Newport area?

Mr. Bosch: That's entirely irrelevant.

The Court: I don't know whether it is or not. You may answer.

The Witness: About four weeks.

Q. (By Mr. Kennedy): About four weeks?

A. After the accident. [219]

Q. After the accident. And then later on he was removed to the Portland hospital?

A. Veterans Hospital in Portland.

Mr. Kennedy: That's all. You may examine.

Mr. Bosch: I have no questions.

The Court: That's all, Sergeant. You may step down.

Mr. Kennedy: Call Mrs. Gilmont. [220]

ROSE MARIE GILMONT

produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Kennedy): Your name is Rose Gilmont? A. Yes.

Q. And you are one of the defendants in this case, are you not? A. Yes.

Q. How many children do you have?

A. I have four children.

Q. Your husband is Mr. Robert Gilmont, one of the other defendants, is that correct?

(Testimony of Rose Marie Gilmont.)

A. That's correct.

Q. Now Mrs. Gilmont, immediately after this accident were you removed to the hospital around the Toledo area?

A. Yes, I was removed.

Mr. Bosch: Your Honor, perhaps it might shorten it up—we are willing to concede in this case there was some personal injury involved in this accident.

The Court: It has no bearing.

Mr. Kennedy: I haven't asked any questions like that, your Honor, and I don't intend to.

The Court: Very well, may I have the question?

(The last question read back by the court reporter.) [221]

Q. (By Mr. Kennedy): When did you enter the hospital?

A. Well, I was taken to the Toledo Hospital some time following the accident, the evening of June the 8th, the exact time I do not know.

Q. Now while you were at the hospital, did you have occasion to talk to Mr. Dorris, the adjuster for Mayflower Insurance Exchange?

A. Yes, I did.

Q. Do you recall when that was?

A. Well, I cannot be positive because I was in a state of shock.

Q. Don't describe your injuries.

A. No, but it was my impression that it was the Tuesday or Wednesday following the accident.

Q. Tuesday or Wednesday following the acci-

(Testimony of Rose Marie Gilmont.)

dent. Do you remember the day of the week that the accident occurred?

A. It was Saturday evening, the 8th.

Q. Saturday. And it would be, it's your recollection it would be the following Monday or Tuesday?

A. Tuesday or Wednesday.

Q. Tuesday or Wednesday. Do you recall your conversation with Mr. Dorris?

A. Yes, I do.

Q. What conversation did you have with him?

Mr. Bosch: Your Honor, I object to any conversation here. As I recall the previous ruling of the Court, the Court has already eliminated the introduction of any evidence as to Mr. Dorris' conversation insofar as his capacity to bind the company is concerned. Now if it's a matter of talking about the facts of the accident, I have no objection to that, although I still don't see the relevancy of the facts of the accident. We know it happened and somebody was hurt.

The Court: It is conceded there was an accident and it is conceded these people were hurt and received, I assume—what do you claim for it, Mr. Kennedy?

Mr. Kennedy: I can make my question more specific and withdraw that question, your Honor.

Q. (By Mr. Kennedy): Mrs. Gilmont, did Mr. Dorris inquire of you as to the whereabouts of Mr. McKinzie during that conversation?

A. Yes, it's my recollection that he did.

Q. What did you tell him?

A. I told him that I had been told by the doc-

(Testimony of Rose Marie Gilmont.)

tors and the nurses and people visiting me that he was in the Newport Hospital.

Mr. Kennedy: I have no further questions.

Mr. Bosch: No questions.

The Court: That's all, ma'am.

Mr. Kennedy: Your Honor, at this time defendants Gilmont [223] will offer the amended and supplemental answer of defendants Gilmont. That's in accordance with the Court's ruling. It will be offered during the case in chief.

Mr. Bosch: Has the Court ruled on it?

The Court: No, I haven't got it even out, haven't marked it yet.

(At this point defendants' Exhibit 34, amended and supplemental answer, was marked for identification.)

The Court: It's been marked as defendants' 34, and you are offering it now?

Mr. Kennedy: We will offer defendants' 34.

The Court: Any objection?

Mr. Bosch: Yes, your Honor. Those are self-serving declarations. They have been supplemented and preceded by our pre-trial order. I admit we offered the original answer, but that was for the purpose of admitting against interest. These are self-serving.

Mr. Kennedy: It shows there is not an admission against interest, your Honor.

Mr. Bosch: The pre-trial order shows that, your Honor.

Mr. Kennedy: Do you want the pre-trial order? I'll offer the pre-trial order, if that's what you want.

The Court: Do you claim that this tends to explain——

Mr. Kennedy: Yes, your Honor, it does. [224]

The Court: All right, with reference to what contention?

Mr. Kennedy: Well, counsel, as I understand it, in the original answer, in a blanket admission of certain paragraphs, I think counsel is claiming that because the attorneys representing them overlooked some admission that we——

The Court: That's an argument.

Mr. Kennedy: I'm sorry, your Honor. But he is claiming an admission in an original answer. I am offering the amended and supplemental answer to show that it's explained, that it is not, that we did not admit it and we do not admit it.

The Court: Let's see it.

Mr. Bosch: To keep it from being self-serving, your Honor, you can cure all kinds of defects.

The Court: Well, for example, if I should tell you today, yes, I acknowledge that I owe you \$10.00, and I go home tonight and I look at my books and I find I was in error, I could certainly come down in the morning and tell you I don't owe you the ten dollars.

Mr. Kennedy: May I approach the Clerk, your Honor?

The Court: Yes, you may. It will be received. A matter of argument, which statement is correct.

(At this point defendants' Exhibit 34, previously marked for identification, was received in evidence.) [225]

Mr. Kennedy: I have some other exhibits marked, your Honor.

The Court: I wonder, Mr. Kennedy, I think the Sergeant can he be excused? You may be excused.

Mr. Kennedy: Possibly, to save time, your Honor, for the purpose of the record I am going to offer when it is marked copies of the complaints by Mr. and Mrs. Gilmont against Mr. McKinzie to recover damages for personal injuries out of the accident, together with appearances filed by Mr. Bosch for Mr. McKinzie. Perhaps we can enter into some stipulation and may not have to go into evidence.

Mr. Bosch: What might not go into evidence?

Mr. Kennedy: Do you wish to stipulate on it or do you wish me to offer it in evidence?

Mr. Bosch: What kind of a stipulation do you have in mind?

Mr. Kennedy: That the actions were filed pending the reservation rights.

Mr. Bosch: I can stipulate that you filed the actions. I don't deny it.

Mr. Kennedy: I'll just offer them, your Honor. I thought maybe we'd just save time. At this time defendants will offer Exhibit 35 which is a report of the driving record of Mr. McKinzie, from the Department of Motor Vehicles, dated February 27, 1958. Do you have any objection? [226]

(At this point defendants' Exhibit 35, report of driving record of Mr. McKinzie, was marked for identification.)

Mr. Bosch: If I recall, your Honor, we already have an exhibit just identical to this offered by the plaintiff.

Mr. Kennedy: That's the purpose of it, your Honor. It is materially different. They offered an abstract of record on an earlier date. This one indicates that his driver's license was not suspended on April 16, 1957. You have seen it before, counsel?

Mr. Bosch: I have no objection.

Mr. Kennedy: At this time defendants Gilmont will offer exhibits for identification 38, 39, 36, 37, 38, being a copy of a complaint by Robert Dean Gilmont vs. Arthur A. McKinzie, filed in the Circuit Court of the State of Oregon for the County of Lincoln, Exhibit 39 being a copy of a complaint filed by Rose M. Gilmont vs. Arthur A. McKinzie, County of Lincoln, Exhibit 36, being a motion filed by Mr. Bosch as the attorney for Mr. McKinzie in the same case in the Circuit Court of the State of Oregon for the County of Lincoln in the case of Rose M. Gilmont, and a motion in the case of Robert Dean Gilmont in the same county.

(At this point defendants' Exhibit 36, a motion, Exhibit 37, a motion, Exhibit 38, copy of a complaint, Exhibit 39, copy of a complaint, were marked for identification.) [227]

Mr. Bosch: If the Court please, I think that these exhibits might properly not be introduced in this case. If the Court will take these into consideration along with the proposed exhibit on behalf of the plaintiff on rebuttal, that is, the agreement of nonwaiver of rights. In other words, I expect these would be a matter for the Court as a question of law to determine. Perhaps it is not properly——

The Court: Yes, I don't see where there is any jury question involved.

Mr. Bosch: Of course, it's a matter of the construction of our——

The Court: Yes, I know it would be a legal question involved. We have certain legal questions to resolve after certain facts are resolved.

Mr. Bosch: I have no objection, your Honor, to admitting that there have been actions filed.

The Court: I think, checking through it, apparently the pre-trial order was subscribed to prior to the institution of these actions.

Mr. Kennedy: No.

Mr. Bosch: No.

Mr. Kennedy: They are listed as exhibits in there, your Honor.

The Court: On the other hand, the pre-trial order does not have an agreed fact, admitted fact, a fact that is. [228] Your agreed facts are that there was a collision, that the defendants Gilmont had retained an attorney, that the terms of the policy, plaintiff if obligated, claiming that the plain-

tiff is obligated to provide a defense for said defendant in any action that may be brought. Your pre-trial order you admit the facts are erroneous. They admit facts that did not exist. There have been actions filed. Oh, well, I take it you are offering these exhibits now?

Mr. Kennedy: I am, your Honor.

The Court: They will be received for the purpose of the legal issues involved and not the factual.

Mr. Kennedy: Very well.

The Court: Those were numbered? 35 through 39.

(At this point defendants' Exhibits 35 through 39, previously marked for identification were received in evidence.)

Mr. Kennedy: Defendants Gilmont rest, your Honor.

The Court: Thank you. Rebuttal?

Mr. Bosch: I wonder if we might have our morning recess while I check my files before I completely rest on rebuttal?

The Court: Yes, I'll give you that opportunity. You have some matters to take care of? [229]

Mr. Bosch: I was going to offer this one and going back to double check my file.

The Court: All right.

Mr. Kennedy: Your Honor, I have no objection to the admission of this with respect to the legal matters, as the Court outlined, but otherwise object as self-serving statements.

The Court: 18 will be received in connection with the legal matters therein involved only.

(At this point plaintiff's Exhibit 18, an agreement between Mayflower and McKinzie, previously marked for identification, was received in evidence.)

The Court: Members of the jury, take a short recess.

(Recess taken.)

(The following proceedings occurred in the presence of the jury.)

Mr. Bosch: There will be no rebuttal, your Honor.

(The following proceedings occurred outside the presence of the jury.)

The Court: Very well. I'd like to have some discussion from counsel as to what form of verdict should be submitted to the jury.

Mr. Kennedy: Excuse me, at this time I submit the requested instructions.

Mr. Bosch: Your Honor, I would like to move the Court at this time for a directed verdict. [230]

The Court: All right. I'll hear you in just a moment.

Mr. Bosch: Your Honor, at this time the plaintiff Mayflower Insurance Exchange moves the Court for a directed verdict against the defendant McKinzie individually and likewise makes the same motion for a directed verdict individually against the defendants Gilmont. The motion for a directed verdict, your Honor, by the plaintiff in this case is based upon these grounds, that on the contentions of the plaintiff in the pre-trial order it has been satisfactorily proved and there has been no evi-

dence to the contrary that the application was made by the defendant to the insurance company on April 16, 1957, that certain representations that he made to the company in that application were false, that these representations were material to the particular risk involved, that in reliance on these representations it is likewise uncontradicted in evidence that the company was induced to rely upon the representations and issued a policy.

We have cited the Court legal authority for the proposition that these are material and the company was entitled to rely on them and issue the policy to the defendant McKinzie.

Likewise the defendant Gilmonts' rights can rise no higher than the defendant McKinzie's. I think the Court has heretofore ruled on that matter. [231] Therefore we have a situation where all the necessary elements of the plaintiff's case in chief have been satisfactorily proved. There has been no evidence to the contrary as to misrepresentations in the policy and as to the matter of the defendants, your Honor. As I understand it the sole defense was left to the defendant after the arguments yesterday on the grounds of laches, and if I understand the testimony this morning and yesterday there has been no testimony or evidence put on before the Court to show any change of position or prejudice. So I would argue very strenuously that one defense has not been satisfactorily established to the Court.

In this case it is somewhat unique, of course, that McKinzie has not appeared for reasons best known

to himself, but in his own deposition which was taken here and which defendants Gilmonts' counsel had benefit of intending and interrogating and cross examining at some length by his own sworn testimony, he admitted he represented these facts not only as to ones we first discovered in investigating the accident, but to a number of others we found developed upon his deposition, and which were likewise relied here when we finally came to our pre-trial order. Some of those, of course, were discovered after we commenced the suit for declaratory judgment. But, it was his own sworn admission in falsifying his application. It is a situation where I think clearly the evidence has shown to the Court that there is no doubt this [232] policy would never have been issued in the first instance if the facts had been correctly represented, and that the company was entitled to rely on those representations in issuing the policy. They had no duty to go forward and make any independent investigation premised on the idea that the applicant was lying.

There was nothing in the application which would give anyone any indication that he was doing other than telling the truth. There was no qualification, no comment, no conditions or anything else which would in any way apprise the company they should make an independent investigation. The company went forward, issued the policy, and in due course found that the man had misrepresented to them something which, if they had known it in the beginning, they would never have contracted to do.

I see no fault upon the part of the company, and even if there is, there still is the element insofar as laches is concerned, there had been no showing, offering or pleading on the matter of prejudice to the defendants Gilmont or McKinzie that they had in any way been hurt.

Certainly, McKinzie could not take advantage of his own fraud and misrepresentation and lead the company into a situation of contract and then contend that just because they elect to stand on their rights he ought to have the benefit of his own fraud. As far as the defendants Gilmont are concerned, if they had been misled to their [233] prejudice, that might be something else. But, as I understand the evidence, there is no issue, there is no proof on that issue. I don't think, your Honor, in this particular case there is anything for the consideration of the jury. I don't see any other evidence.

I wonder if the Court has had the opportunity to read a few of those cases which were cited in my——

The Court: Trial brief—yes, I think I acquainted myself with all of them.

Mr. Bosch: There was a case of State Farm Mutual vs. West, a District Court case.

The Court: Yes.

Mr. Bosch: I invite the Court's attention to that particularly, because the facts were not dissimilar. Likewise, a case which was only published in the last week, Ott vs. Integrity Mutuals, in Wisconsin, 90 N.W. 2nd. Both of those cases, your Honor, the

Court had no trouble whatsoever finding that these particular representations were similar or almost identical to these here were material to the risk and that if the company had been properly advised——

The Court: As a matter of law.

Mr. Bosch: Well, in each case, your Honor, I must confess those cases were tried by the Court. So whether it was found as a matter of law or as a matter of fact is difficult to determine. [234]

The Court: I think it was a finding of the Court.

Mr. Bosch: I think so too, your Honor. Of course, that's what I am submitting here by this motion is that there is no contrary evidence, and that the Court should find, withdraw that issue from the jury and find as a matter of law. Is there any point upon which I have not covered which the Court is in doubt about?

The Court: I have none at the moment. I'll tell you, Mr. Kennedy, for the reasons that I shall give hereafter I feel that the case should go to the jury on the question of the claimed fraudulent representations primarily as to whether or not they were material. But I'll have to submit the whole issue. So, therefore, I'd like to hear from you on your affirmative defense of laches.

Mr. Kennedy: May I say just a word on the case as a whole in response to the directed verdict. It will be very brief.

The Court: I have told you my position with reference to the——

Mr. Kennedy: Very well. With respect, as I

understand it, the Court feels then they have the burden of proof. It's a jury question. It's a fact question. In addition to that it has been the position of the defendants Gilmont that they are seeking to rescind on the ground of fraud, that as a basic and fundamental element of the right to [235] rescind is the requirement that a person must act promptly upon the discovery of any fraud or any misrepresentation, and it has nothing to do with prejudice or anything else. It doesn't go into the question of laches. This hasn't anything to do with our intentions of affirmative defenses. It's a defense to their cause of action.

The Court: Under the general denial?

Mr. Kennedy: Under the general denial, correct, your Honor. I believe that when a person has knowledge of the facts which may give them a right to rescind or has been placed upon notice of certain facts which would, which should cause them to make further inquiry, they must act promptly to rescind. If there is any unreasonable delay then they cannot rescind but they can only sue for damages. In this particular case——

The Court: I won't subscribe to it on that theory.

Mr. Kennedy: Very well, your Honor. The question, as I understand it,—does the Court wish to hear me on any of our other contentions?

The Court: Your contention of laches.

Mr. Kennedy: On the question of laches, your Honor, I think there has been, I think the evidence shows sufficient facts to submit to the jury that there has been unreasonable delay. I think there

certainly is an inference from the evidence sufficient to submit to the jury that both Mr. McKinzie, [236] the insured, has been prejudiced from the standpoint of having the insurance company purport to represent him for approximately, well, from June up until almost October 1st. There has been the mere fact of delay it is prejudicial. There has been prejudice on the part of the defendants Gilmont in that again the mere fact the delay is prejudicial in a case of this kind.

I think that the Court, of course, will recognize that personal injury cases are handled by lawyers quite a bit differently in the case of insurance and no insurance. On the one hand, if you know there is not any insurance, you make proper inquiry to determine any assets of the defendant. To make sure any assets will not be transferred.

If you are led to believe that such, well, there is no evidence to support it, but if you have a case where there is insurance, where the company is negotiating with you, you explore the possibilities of settlement. If, after a period of some four months, there is denial or an attempt for rescission, I think the mere fact of the forbearance to sue or proceed with the case is certainly sufficient evidence of prejudice to submit that matter to the jury.

It's a question of whether reasonable minds would differ as to whether there has been unreasonable delay or prejudice. That, basically, your Honor, I think is the position of the defendants Gilmont. [237]

The Court: Thank you. Well, this is a hardship case. We have them, unfortunately, very often.

Now, as you and I drive down the highway and we see somebody approaching us, we don't know whether they have coverage or not. We have no vested right in the State of Oregon, no reason to believe that any other car on the highway is financially responsible for the harm that he might do. Our law seems to be that every dog is entitled to at least one bite. So, as I say, it's a hardship case. People sustain property damage and they have personal injuries, all to their damage. They thought when claims were asserted that that was financial responsibility in the form of public liability insurance. It then developed that the company having issued a purported policy, through its policies of its own, not for me to say whether they are good public relations or bad public relations. They asserted their legal right just the same as any individual can assume a legal right. They claim that they were fraudulently induced to enter into this contract of insurance and grant their financial support to the defendant McKinzie. A legal right for them to assert, and if they were fraudulently induced, the law should protect them. It's too bad that innocent third parties should be affected by the wrongdoing of McKinzie these many months ago. If they weren't fraudulently protected, why then McKinzie should have the benefit of that [238] which he paid for and the defendant Gilmont should have the benefit of the resulting effect of having that financial responsibility behind them.

I can well understand that in order to secure the benefit of that financial responsibility the defendant Gilmont, of course, would grasp for every straw that there is to hold the insurance company in the picture. Now the Court has weeded out this proposition of negligently investigating the accident and failing to do so, or failing to do that. It is not for the defendant Gilmonts to say how the insurance company should conduct its investigation. They have the burden first of all of showing that McKinzie was at fault, that his fault was the proximate cause of the damage. If they—the law giving the benefit of going against any insurer if insurer there be.

So Gilmont is not in a position of standing, or the contractual relationship with the defendant, or the plaintiff in this case, they are in no position to assert any particular legal right in connection with the investigation.

The Court did bear with them with their theory of laches, and we have a case that arose in this very Court, this District, in which an insurance company blew hot and cold, and during that period of vacillation the so-called beneficiary of the insurance company's position was changed and he suffered a change of position. And then for the insurance company to say, well, now, blow cold, the Court said no. You have changed the position to the prejudice of these people. From here on you are going to blow hot.

Now I am willing to bear with the defendant Gilmont that there may possibly be sufficient evi-

dence to go to the jury on the question of laches in this unorthodox way of trying to get a dollar through the Secretary of State's office. Now assuming for the sake of argument that we can say that that was a vacillation, blowing hot and cold, in a matter of right, assuming that the adjuster did tell these people, we will hold off filing the suit for a while, it will work out, or words to that effect, assuming further he had authority to bind the company to that, this Court has listened attentively to the evidence and there is not one iota of evidence that these, the family, defendant Gilmonts position had been changed to their detriment by reason of such delay in filing the action. None whatsoever.

If counsel has suggested by reason of that delay that McKinzie was able to secrete his assets, then I certainly would go with that theory. As I say, it's a hardship case, and however it's a land of law and not of men. I am forced to remove from the jury the question of laches, but it will go to the jury on the question of fraudulent representations in the first part, which is conceded to be the test in Oregon by both parties. [240]

Secondly, whether or not one or more of those representations were material to the risk, and I shall give to you, this is going to be in the way of paraphrase, but I think their advice, counsel, in connection with their argument that this is what I have adopted and will instruct the jury as a test of the representation material to the risk.

A fact is material to the risk when, if known to

the underwriter, it would have reasonably caused or influenced him when acting in accordance with the usual custom of insurers to refuse the risk or would have reason for his demanding a higher premium. Now I take that to be a classical description of a representation material to the risk.

Now does the plaintiff have any requested instructions?

Mr. Bosch: Yes, your Honor.

Mr. Kennedy: No, your Honor. I'm sorry I misunderstood your Honor. May I inquire, are you going to submit to the jury part of the elements of actionable fraud?

The Court: Oh, yes, classical five or six elements, whatever you call them.

Mr. Kennedy: Thank you, your Honor.

Mr. Bosch: Your Honor, I hate to, will the Court permit me to remark on one other piece of evidence in this case?

The Court: Yes. [241]

Mr. Bosch: With regard to materiality. This manual was introduced at the request of the defendants concerning the instructions given to the agents, and on the second page of those instructions it's under the list of ineligible or prohibited risks. It says, revocation of license within three years. No agent, and certainly no underwriter of the agent, could, under the company's policy and under their specific instructions, have written this particular policy with that suspension of revocation. The suspension of revocation is not in dispute in this case. If that be made known by the

applicant, then I think there is no doubt under the instructions which this particular company gave to its agents in the underwriting department that the company would have no choice, it wouldn't have considered it one way or the other. They would have rejected the risk.

To me, I therefore can't see where there is an issue of fact to be submitted to the jury.

The Court: Well, supposing for the sake of argument they had said, you will not issue a license or prohibited from issuing a policy that the man smoked black cigars.

Mr. Bosch: I think that the difference between black cigars and a suspension of a driver's license is a matter which a Court can find.

The Court: That's the very reason why the Courts have universally adopted this position when acting in accordance with usual custom. [242]

Mr. Bosch: Well, this Court cannot find then as a matter of law that makes the matter as far as I am concerned——

The Court: That's right. To say it's a perfectly reasonable requirement.

Mr. Bosch: Thank you.

The Court: It's a closed question. I'll agree with you, but I can't say as a matter of law.

Mr. Kennedy: Do you want us to proceed now, your Honor, or did you want us back——

The Court: I wanted to resolve these requested instructions if I could. I think you better call the jury and we'll send them out while we resolve these.

(The following proceedings occurred in the presence of the jury.)

The Court: Members of the jury, all of the parties have indicated that they have completed the submission of evidence in the case. I see it is right at 11:30, and the Court and counsel have the chore of settling instructions in the matter, and rather than to keep you upstairs you may be excused until 2:00 o'clock this afternoon. Recall the admonition of the Court. 2:00 o'clock this afternoon, and immediately go into arguments and instructions. 2:00 o'clock, please.

(Discussion between Court and counsel regarding requested instructions.) [243]

(Noon recess.)

Afternoon Session

(At 2:00 o'clock p.m., Court reconvened proceedings pursuant to noon adjournment.)

(The following proceedings occurred in the presence of the jury.)

Mr. Kennedy: If the Court please, Mr. Pihl has to be in the State Court today at 2:00 o'clock and he wanted me to ask the Court to excuse him and excuse his presence here.

The Court: Does the plaintiff have a suggested form of verdict?

Mr. Bosch: (Nodding head.)

The Court: Consenting to go on the general—

Mr. Bosch: Yes, your Honor.

The Court: Thank you. Plaintiff's opening argument.

(Arguments.)

The Court: Members of the jury, as you all know, this trial has now progressed to the stage and a point where it becomes the duty and the privilege of the Court to advise with you and to instruct you as to the law involving the controversy we have before us, and which shall guide you throughout your entire deliberations of the questions of fact and the controversy in issue that shall be submitted to you under the status of the evidence pursuant to these instructions.

Now bear in mind, members of the jury, as such a trial jury, you are the sole and exclusive judges of all of the facts in controversy. [245] And the Court has no right or prerogative, in fact it's unlawful for it to in anywise influence you in your ultimate determination of the facts.

However, the Court is here for the purpose of advising with you primarily as to the law and under proper conditions and circumstances to advise with you concerning the status of the evidence.

Now bear in mind that if during the course of this trial the Court has, or during the instructions you gain some impression as to how the Court might feel with reference to a fact in controversy, disgorge that from your minds. But if during the course of these instructions the Court should make some comment concerning the evidence, bear in mind that that is purely advisory to you. You give it such weight as you deem that it is entitled to.

But do not let it influence and effect your decision and ultimate verdict to the extent that you adopt the suggestions or advice of the Court over and above your own judgment concerning the matter. It is purely advisory. Give it such weight as you deem that it is entitled to.

For the same token it is the Court's prerogative to advise you as to the law. Therefore, it is your duty to accept the law concerning the matter as given to you by the Court and not to substitute therefor what you think the law should be or what you think the law is. [246] If you think the law is harsh in one instance or lenient in another instance, you cannot substitute your own judgment. The law is made for you and me, and all of us must follow it. It is incumbent under your oath to follow the law in weighing the evidence.

The statements of counsel during the course of trial are their arguments in the summation of the evidence and their theories of the controversies are advanced to you as not evidence in the case. You cannot consider the same as evidence, but give their arguments such weight as you deem they are entitled to in helping you to analyze the evidence and to aid you if you find that it does in arriving at a true and a just verdict between these parties according to the evidence and the law as given to you.

In addition to the evidence that has been submitted and which you shall determine the truth of the matter from the conflict of the evidence, there are certain facts that have been admitted or

agreed to by the parties in their pre-trial order. And they are binding upon us. I shall read to you these facts which are agreed upon between the parties, which you shall consider as binding upon you, in addition to the status as you shall find the conflicting evidence ultimately resolves itself.

It is admitted by the parties that the plaintiff, Mayflower Insurance Exchange,—first of all, [247] members of the jury, I want to call your attention to the fact that the parties to this action as they now stand before us are, the Mayflower Insurance Exchange, the plaintiff, and I shall refer to this party hereafter as the plaintiff. The defendants in the action are: a William Allen McKinzie, who has not appeared in this Court. And the remainder of the defendants are: Robert Dean Gilmont, Rose Marie Gilmont, who have been present in the courtroom, and Susan Rose Gilmont, a minor child, Robert Russell Gilmont, a minor child, and Norman I. Gilmont, a minor child, who have not appeared physically in the courtroom, but they have appeared legally in the courtroom through their guardian ad litem, a Robert A. Watson, an attorney of this city who appeared the first day and then was excused by the Court.

Now members of the jury, the defendant McKinzie had the right to appear here if he wished to, and he had the right to remain absent if he wished to. You should give that no particular consideration as between these parties, and I shall instruct you a little bit later as to the relationship

between the parties Gilmont and the defendant McKinzie.

As far as this action is concerned, I will merely refer to the defendant Gilmont as the defendant, and if there is an occasion to refer to McKinzie, I shall refer to him as McKinzie. [248]

Now the parties, the plaintiff and the defendant, have admitted in their pre-trial order, have agreed to and admitted the following facts:

That the plaintiff is an unincorporated association organized under the laws of the State of Washington, and is the reciprocal and inter-insurance exchange, and is authorized by the laws of the State of Washington to be sued and to sue in its own name. The defendant McKinzie is a citizen of either the State of Oregon or the State of California, and the defendants Gilmont are citizens of the State of Oregon if the matter in controversy exceeds \$3,000.00.

The defendants' minor children of the guardian ad litem that's been appointed for the minor children has appeared. That on or about April the 16th, 1957, the plaintiff issued a certain policy of insurance to McKinzie, which insured, being McKinzie, against public liability for personal injuries and property damage arising out of the operation of his 1951 Cadillac coupe automobile with certain limits of which we are not interested.

On or about the 8th day of June, '57, near Toledo, Oregon, McKinzie, while operating his mentioned automobile, which was insured by the policy, was involved in a collision with an automobile owned

and operated by the defendant, Robert Gilmont. The collision resulted in personal injuries to all of the defendants Gilmonts and damage to the automobile owned by [249] the defendant Arthur McKinzie. And the defendant Robert Gilmont.

Further, that the defendant Gilmont had retained an attorney, and was demanding that the defendant McKinzie and the plaintiff respond in damages to their injury, under the policy. And there follows legal matters of which the jury has no concern.

Now it's the contention of the plaintiff that under the admitted facts and under its theory of the evidence as produced in the Court on its behalf and the contradictory evidence on behalf of the defendant that at the time McKinzie made application for the policy of the insurance that was issued and that subsequent to the receipt of the application and in reliance upon the statements and representations made therein, the plaintiff issued to McKinzie the mentioned automobile insurance policy.

Then the plaintiff further contends that certain statements and representations made by McKinzie in his application for the insurance policy were false, in that on April the 16th, 1957, the defendant McKinzie made the following answers to the following questions put to him by the said application:

Question 1—Have you or any driver of this car, subsection "a", any physical impairment?

And the answer elicited was: No. [250]

That's the answer of McKinzie, according to the contention of the plaintiff.

“b” Had auto insurance cancelled or refused?

The answer elicited from McKinzie was: No.

“c” Has license revoked or suspended?

The answer elicited from McKinzie is: No.

“d” Received any driving charges, citations or fines (not parking) in past three years?

The answer given by McKinzie: No.

“e” Been involved in any auto accident as a driver in the past three years?

The answer given: No.

Question 2—Name of previous insurer.

Answer given: None.

The plaintiff goes on to further contend, whereas in truth and fact defendant McKinzie's driving privilege had been suspended by the Department of Motor Vehicles of the State of Oregon, which suspension was in effect on April 16, 1957, that defendant McKinzie had received various driving charges, citations or fines (not parking) in the three years prior to April 16, 1957, that defendant McKinzie had been involved in an auto accident as a driver within three years prior to April 16, 1957, that the defendant McKinzie did have various insurers who had issued to him automobile insurance liability insurance policies prior to [251] April 16, 1957.

The plaintiff further contends that it would not have issued its automobile liability insurance policy to defendant McKinzie had it known the true state of facts, and if the defendant McKinzie had truthfully and correctly answered the questions put to him on said application. Whereupon, the plaintiff

has asked certain legal relief as shall be determined from the factual situation as determined by this jury.

As part of its contentions, the plaintiff generally and specifically denies all of the contentions of the defendant Gilmont, which I shall call to your attention.

Now the contentions of the defendant Gilmont, which will be submitted to you, are:

First, that it denies generally and specifically each and all of the contentions given to you and read to you and submitted to you under these instructions as asserted by the plaintiff, that is, denies the falsity of the claimed answers and it denies that they were given fraudulently, and in effect denies all of the contentions which I gave to you. And then further asserts that the plaintiff was careless and negligent in obtaining and completing the application of insurance from the defendant McKinzie, and therefore the defendant contends for a legal matter that they cannot now take advantage of any fraud which may have [252] been committed by Mr. McKinzie, which they deny was committed.

Now members of the jury, resolving from these contentions, you have in effect two issues to determine. The first issue is whether or not one or more of these alleged answers given by McKinzie was false. If so, whether or not such false representation or representations were made fraudulently with the intent to deceive the plaintiff. And if you find, and the next paragraph of that issue is,

whether or not if those were fraudulent representations, whether or not they were material insofar as the plaintiff was concerned.

Now instructing you specifically as to this first issue, the Court wants to call to your attention that the Gilmonts are herein parties to this lawsuit because they claim some rights against the plaintiff insurance company through McKinzie. They are not a party to the insurance contract. Therefore, any right that they have must be asserted through McKinzie. And in this connection you are instructed that the defendants Gilmont have no greater rights in and to the coverage afforded, if any, by the policy, and any per cent which the plaintiff has against the defendant McKinzie are likewise applicable to the defendants Gilmont.

In other words, the defendants Gilmonts' rights, if any, are derivative and cannot be greater or better nor less than the rights, if any, of the defendant McKinzie against the insurance concern. Therefore, this lawsuit between these [253] parties present must be determined upon the transactions had between the plaintiff insurance company and the one McKinzie prior to the accident referred to in the admitted facts and the evidence.

So in considering this issue, one, which is submitted to you, you cannot consider the fact that there was an accident or that any person was injured. You must reach a determination without regard to the fact that there was an accident of any nature. Because these alleged transactions had

between the plaintiff and the defendant McKinzie and their respective rights in connection with this policy of insurance must be determined by the facts as you shall find that they existed prior to any date or any accident, date of any accident.

In connection with the portion of the law of the State of Oregon and in connection with plaintiff's charge that McKinzie made certain statements or representations in his application for insurance which were false, you are instructed that all matters which are stated in an application for insurance are to be considered by you as representations and not as warranties, and the mere fact that any statement or answer in the application may have been incorrect is not in and of itself sufficient to entitle the plaintiff to rescind or be relieved of its obligation under the insurance policy.

You are instructed that mere falsity, if any, contained [254] in the application is not sufficient to annul the policy of insurance, as I told you. Any such representation, if any, must have been not only false but fraudulently with the intent to deceive. And furthermore, material to the risk, to be either accepted or rejected by the plaintiff insurance company upon the application.

You are instructed that the general proposition of dealing among men that fraud is never presumed and it must be established by evidence which is clear, satisfactory and convincing. There is a presumption which is reasonable in ordinary dealings that a person is innocent of a crime or wrong and the private transactions may have been fair and

regular. Therefore, we say it must take clear and convincing proof to show that the transactions were not regular but were fraudulent with intent to deceive.

Therefore, in determining whether or not any one or more of the claimed representations were false and fraudulent, you are instructed that the plaintiff has the burden of proving all of the elements of fraud. You must find by a preponderance of all of the evidence in the case that, first, McKinzie made the representations, or at least one or more of them as claimed.

Second, that any such representation or representations were false, and that they were material to the risk representations. [255]

Further, that any such representations were made by, if made by McKinzie, were with the knowledge on the part of McKinzie that the representations were false or that he made such representations recklessly and without regard to their truth or falsity.

You must further find that McKinzie made those representations, one or more of those representations, if any, for the purpose of deceiving the plaintiff, and that they were made for the purpose of inducing the plaintiff to act upon them.

Then you must further find as a further element that the plaintiff was ignorant of the falsity, if any, of any representations. And that the plaintiff actually relied upon those representations, and that he was, that is, the plaintiff, was acting as an ordi-

nary prudent, careful insurance company was entitled to rely upon any such representation.

Then if you find all of those facts, one remaining fact which you must find is, that when I say rely upon those representations, I mean, of course, relying on them to the extent that it causes the insurance company to issue its policy.

The last remaining element, that the plaintiff suffered damage because of the false and fraudulent representation, if any. [256]

So you are instructed that all of these elements must exist before you can find that there was fraud in this case to the extent as contended by the plaintiff and to entitle it to a verdict at your hands. The absence of any one of these elements given to you is fatal to the finding of the fraud or recovery by the plaintiff.

Now the Court has used the expression, "material to the risk". The definition of this phrase or expression merely means that a fact or a representation of a fact is material to the risk when, if known to the underwriter or the insured, when if known to the underwriter it would have reasonably caused or influenced him to refuse the risk or it would have been a reason for his demanding a higher premium if he accepted the risk.

The plaintiff further contends, as called to your attention, that McKinzie denied that he had received any driving charges, citations or fines within the three years prior to the date of his application. Whereas the plaintiff contends that in fact he had received three driving citations from the State of

California and one in the State of Oregon during said period.

Your attention is called to the fact that the evidence on behalf of the plaintiff as to the citations in the State of California stands unrefuted by the evidence on behalf of the defendants. In consideration with the so-called citations [257] in California, you are instructed that there has been introduced into evidence a certified copy of various driving citations, which the defendant McKinzie received in the State of California within three years prior to the time he made his application for insurance. These are identified as plaintiff's Exhibits 19-b, 19-c and 19-d.

Now these exhibits do not refer to the citations of the alleged offense in a common term, such as speeding or violation of the basic law, as many of the citations you know do. They merely refer to code numbers, so as you may not know as to what the law of California is and as to what type these violations were, I call your attention to the following code sections referred to in the exhibit.

Plaintiff's Exhibit 19-b reveals that defendant McKinzie was charged with violation Sec. 577 of the vehicle code of the State of California, of which this Court takes judicial knowledge, and you are instructed that the provisions of such Sec. 577 reads as follows:

Whenever a flashing red or yellow signal is used as a traffic sign or signal, it shall require obedience by vehicular traffic for traffic as follows:

Flashing red, stop signal. When a red lens is

illuminated by rapid intermittent flashes, drivers of vehicles shall stop before entering the nearest crosswalk at an intersection or at a limit line when marked, and the [258] right to proceed shall be subject to the rules applicable after making the stop at a stop sign.

Flashing yellow: When a yellow lens is intermittently with rapid intermittent flashes, drivers of vehicles may proceed through an intersection or pass said signal only with caution.

That is the law that the citation revealed that the defendant McKinzie was cited for, violation for.

And Plaintiff's Exhibits 19-c and 19-d showed the defendant McKinzie on two occasions violated Secs. 510 and 511 of the vehicle code of the State of California, which this Court likewise takes judicial notice, and you are instructed that the provisions of these sections, 510 and 511, are as follows:

510 is designated as the basic speed law, and it provides:

No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for said traffic thereon, surface and width of the highway, and in no event at a speed which endangers the safety of persons or property.

511, of which I shall paraphrase for you, and it merely designates certain speeds within certain areas. Designating a designated speed for one area, such as school buildings. Another designation, setting aside an [259] area with a designated speed of twenty-five miles an hour in business and resi-

dential sections. And then follows a designated speed of fifty-five miles per hour in other types of, in all other areas, unless a different speed is especially designated in this code.

Now these designated speeds are merely, are not speed limits as such ordinarily referred to, but are merely indicated speeds, a violation of which is merely a *prima facie* violation of the basic rule as read to you unless other facts show that it was reasonable and prudent to drive at a faster speed in those designated areas. Those being the traffic laws of which the defendant McKinzie was cited as having disobeyed in connection with those exhibits.

Now members of the jury, there is a second issue which is raised by the contention of the defendants Gilmont as to whether or not the agent at the time he took the answers from McKinzie acted with ordinary, reasonable care for the protection of his own company, and in that connection you are charged that the defendants Gilmont have charged that the plaintiff, acting through the agent who took the application, was careless and negligent in obtaining and completing the application of insurance from McKinzie.

You are instructed, members of the jury, that negligence as ordinarily defined, is a failure to do that which an ordinary, reasonable prudent person would do under the same [260] or similar circumstances, or doing that which an ordinarily reasonable prudent person would not do under the same or similar circumstances.

Therefore, if you should find from the evidence that the plaintiff, acting through its agent, was careless and did not act as a reasonably prudent person, being an insurance company, in obtaining the answers from McKinzie while filling out the application for insurance by Mr. McKinzie, and thereby blindly or recklessly put down defendant's answers to the questions without reasonable credence, you should then find that the plaintiff is not entitled to be relieved of obligation under its policy because then through such action and conduct he would have been, become a party to the transaction.

However, if you find that the plaintiff's agent while taking down the answers acted reasonably in accepting the answers given to him by McKinzie, then McKinzie is bound by his own doings as you shall find them from all of the evidence in the case subject to these instructions.

Now, members of the jury, the party having an affirmative of an issue in any lawsuit has the burden of proof, and by burden of proof we merely mean that such a party has the burden of proving his contentions by a preponderance of all of the satisfactory evidence in the case. And by preponderance of evidence I have used the expression [261] preponderance of evidence, and by preponderance of evidence we merely mean the greater weight of the evidence or that quantum of the evidence when fully and fairly considered and weighed produces upon the reasonable and impartial mind the stronger impressions and is more convincing

of its truth in the evidence in opposition thereto. In other words, the party having the burden of proof must make out the better and most reasonable case in light of all of the evidence in the case.

So it follows, members of the jury, that if you should find from all of the evidence in the case that defendant McKinzie did not give one or more false answers in his application, or you should further find that one or more of said answers were false but they were not made fraudulently with the intent to deceive, or that if any such answers were fraudulently made, that they were not material to any of the risks as you have been instructed. Then that would end the lawsuit and your verdict would have to be for the defendants.

If, on the other hand, you should find from the preponderance of all of the evidence in the case that the defendant McKinzie made one or more false and fraudulent answers to the questions in the questionnaire, as contended by the plaintiff, and you further find that any one or more of such false answers was made fraudulently with the intent to deceive the plaintiff, and further, that the plaintiff, [262] that such representations were material to the risk and that the plaintiff relied thereon, and did not know or had no reason to believe to know, acting as a reasonably prudent person that they were false, and they acted to their damage upon those false and fraudulent representations, if any, then you are instructed it would be your duty to return into Court a verdict in favor of the plaintiff.

So members of the jury, throughout your entire

deliberations upon the questions of fact in this case, in your determination of the liability or the non-liability on the part of the plaintiff under its policy of insurance, which it claims it is relieved from by reason of these alleged false and fraudulent representations causing it to act to its damage, you must not be influenced in any manner by sympathy or prejudice or bias of any kind. And your verdict must be based upon a calm and orderly and a judicious consideration of all of the facts in the case without reference to the status of the parties, subject to these instructions.

Members of the jury, every witness is presumed to speak the truth. However, this presuming may be overcome in the manner in which the witness testified, by his motives, and by evidence affecting his character or by contradictory evidence.

And you may also take into consideration in evaluating and determining what credence to give, credibility you desire [263] to give to the testimony of any witness, you may take into consideration what interest, if any, that witness may have in the outcome of your verdict.

A witness willfully false in one part of his testimony must be distrusted by you in the other parts of his testimony.

Evidence as such is to be estimated not only by its own intrinsic weight but also according to the evidence which it is within the power of one side to produce and of the other to contradict.

Therefore, if less or weaker evidence is offered when it appears that stronger and more satisfac-

tory evidence was within the power of the party to produce, such evidence as offered should be viewed by you with distrust.

When you retire to the jury room you should elect from one of your numbers a foreman to act as your chairman to guide you throughout your deliberations. Bear in mind, members of the jury, that your ultimate verdict in this case must be the unanimous conclusion of the twelve members of your jury.

You will be supplied with two forms of jury verdict. The first verdict in my hand carries the caption and title of the case, and reads:

We the jury, members of the jury duly impaneled and sworn to try the above-entitled cause, do find our verdict in favor of the plaintiff. [264]

If this be your verdict, cause your foreman to date it and sign it and return it into Court.

The next form of verdict, bearing the title and the cause:

We the jury, duly impaneled and sworn to try the above-entitled cause, return our verdict in favor of the defendant Gilmont.

Then a date line. If this be your verdict, cause your foreman to sign it, date it and return it into Court. Does counsel desire conference with the Court before submitting it?

Mr. Bosch: No, your Honor.

Mr. Kennedy: No, your Honor.

(The following proceedings occurred out of the presence of the jury.)

The Court: Plaintiff's exceptions.

Mr. Vosburg: Just for a matter of information, your Honor, as I understand it, we don't take exceptions here. We object to the instructions. Am I correct in that, your Honor?

The Court: Well, I think the word is exception.

Mr. Vosburg: I'll use them both, your Honor.

The Court: 51 is the rule. Why don't you use both?

Mr. Vosburg: I'll use them both, your Honor.

The Court: Let's see what the rule says. [265] You can act accordingly. Instructions to the jury: The word seems to be object. No party may assign error in giving, the giving or the failure to give an instruction unless he objects thereto prior to, before the jury retires. So you are technically correct. Objects.

Mr. Vosburg: Out of an abundance of precaution, your Honor, the plaintiff will object to and take exceptions to the instructions of the Court in the following particulars:

We object and except to the failure of the Court to give the plaintiff's requested instructions.

The Court: Which one is that?

Mr. Vosburg: Your Honor, I don't believe you have given any of ours.

The Court: Well, there is one I gave part of, but not in your form. Number 1, defendant failed to truthfully disclose his answers to the questions. I think that was covered. I didn't give it in your form. But I think it was covered.

Number 2 was taken from the jury.

Number 3 was taken from the jury.

Number 4 was taken from the jury.

Number 5 was taken from the jury.

Number 6 was taken from the jury.

Number 7 was taken from the jury.

You conceded that number 10 was covered by defendants' instruction. [266] And I refused to give defendants' number 11. You may have your objections.

Mr. Vosburg: May I call your Honor's attention when you say they were taken from the jury, our instructions, I think 2, 3, 4 and 5, those are the ones which your Honor has ruled here during the course of argument there was no evidence to sustain the submission to the jury. I don't think your Honor specifically has withdrawn them from the jury except by inference, and the reason I am calling this to your Honor's attention is, there has been introduced as evidence, and I assume will be submitted to the jury, this amended and supplemental answer of the defendants which sets out all of these other so-called alleged defenses, which you have withdrawn. I just call that to your Honor's attention. The jury may be misled.

The Court: I'll instruct the jury as to that. Those are being received for one purpose.

Mr. Vosburg: In addition, your Honor, the plaintiff takes exception to and objects to all that portion of the Court's instructions to the jury wherein the Court set forth the element of fraud and instructed the jury that the plaintiff must prove each and every element in order to entitle it to recover.

First, I think, your Honor, I may not be in exact order, but you talked about a material rep-

resentation, falsity. They must know it was false. [267] It was made with the intent to deceive. And that the plaintiff must not have known that it was false. He must have relied on it. He must be entitled to, they must have found he must be entitled to rely on it. Then your Honor instructed they must find it must be material to the risk.

Those instructions, your Honor, ran, those statements ran entirely throughout your instructions, and the point that we wish to object to and take exception to, your Honor, is that there was no basis for submitting these to the jury.

It is our contention that each and every one of the facts of which your Honor instructed the jury has been conclusively presumed by the evidence, and that there is no evidence to be submitted to the jury.

I appreciate, your Honor, that this is merely in another way paraphrasing our motion for a directed verdict, but in order that there may be no question about the matter, we do make the point in objecting to all of those instructions on the basis that there is no evidence that the jury could find to the converse of those because the fact, facts, and unquestionably show that those, all of those facts were present and that therefore there is no issue to be submitted to the jury on those particular factors.

In other words, the evidence conclusively shows that actionable fraud was committed, and that the plaintiff was entitled as a matter of law to recover in this particular case, [268] or to be specific, to rescind the contract.

The plaintiff also wishes to take exception and objects to the submission to the jury and in the instructions to the jury on the ground that the agent who took this application, the question of whether he was negligent and careless in obtaining the application—the point that we wish to point out to your Honor and object to and take exception to, is that there is no duty in the first instance or any obligation which would permit the question of negligence or lack of negligence to be submitted to the jury. And secondly, that even if that were a proper issue in this case, that the evidence conclusively shows that due care was used.

There is not a scintilla of evidence or any facts whatsoever to permit the jury in this particular case to define, to find that the plaintiff or its agents did not use due care and diligence.

Therefore, it is a submission of the question of fact first of which there is no issue, and second, if there was an issue, that it is conclusively shown that the plaintiff did comply with all of the requirements of law.

The plaintiff takes exception to, objects to those portions of the Court's instructions in which the Court mentioned a burden of proof, and stated that the burden of proof to proving all of these elements of fraud was on the plaintiff. This is a reiteration of our motion for directed verdict, [269] and our theory and the point we wish to call to the attention of the Court is, that there is no evidence that the evidence conclusively shows that we are entitled to recover. We have fulfilled all the burden of proof, and therefore that the jury should not

have been instructed that the burden of proof is on us because all elements have been complied with and of course a directed verdict in favor of the plaintiff.

I believe that's all of our exceptions.

The Court: You may have your exceptions.

Mr. Kennedy: No exceptions, your Honor. I do have an inquiry.

The Court: Yes?

Mr. Kennedy: Is your Honor going to merely instruct the jury that the answer and the amended answer and supplement, that the amended and supplemental answer are being given to them only for the purpose of possible admission?

The Court: Yes.

Mr. Bosch: Might I suggest it might ease the thing at this stage, we would have no objection to withdrawing it for whatever it was put in for. I may have made my offer, and it's in and I appreciate I am bound, and I can't withdraw it now. But if that would help, I would withdraw that answer now.

The Court: What's the defendant's position?

Mr. Kennedy: I'm a little bit concerned because counsel [270] explained in detail when he was offering it what it was being offered for. And I'm afraid the jury might be, well, we'll withdraw both of them. We will agree to withdraw both of them.

The Court: I will instruct the jury to disregard any comment about it.

Mr. Kennedy: I would just as soon.

The Court: Leave it alone. Very well.

Mr. Vosburg: Through inadvertence I neglected

to make one exception and objection. Might I have another opportunity?

The Court: Yes, you may.

Mr. Vosburg: Your Honor, you instructed the jury in effect that the fact that defendant McKinzie did not appear in this case was of no significance and should not be considered by the jury.

The plaintiff objects to, or takes exception to that instruction on the ground that it is not a correct proposition of law, that I think the fact that the defendant McKinzie did not appear is admission in this case, should be considered by the jury, and the fact that the defendant McKinzie has not appeared or made no appearance in this case, that therefore the defendants Gilmonts have no standing in this Court, and that therefore the instruction that it had no, the fact that McKinzie was not, did not appear and had no significance, is not a true statement of fact because according to our contention his absence precludes the Gilmonts from recovering in this case. [271]

The Court: I understand your position in this matter about it. I'll restate my position about it. As far as I know the interests of the defendants Gilmonts and the defendant McKinzie are adverse. For all I know, maybe he is staying away purposely. Their respective rights being adverse, they are not standing in privity to each other. This is a controversy being purchased here between plaintiff and the defendants Gilmonts. That's my position. Call the jury.

(The following proceedings occurred in the presence of the Jury.)

The Court: You may retire to the custody of the bailiff for your determination of the verdict. We will recess for it, awaiting the verdict of the jury, and I'll say to counsel, I'll ask you to hold yourselves available for further proceedings if necessary in the proceedings, and the return of the verdict, and if you voluntarily absent yourself, be deemed a waiver of your right to be present. I'll say one thing further, that if you wish to leave you may do so, and if you will leave your name, we will call you, but we won't wait more than ten minutes for you. Because it isn't fair to the jury.

(At 3:55 o'clock p.m., Court adjourned.)

[Endorsed]: Filed February 25, 1959.

[Endorsed]: No. 16394. United States Court of Appeals for the Ninth Circuit. Mayflower Insurance Exchange, Appellant, vs. Robert Dean Gilmont, Rose Marie Gilmont and Ronald A. Watson, Guardian ad Litem for Susan Rose Gilmont, a minor, Robert Russell Gilmont, a minor and Norman I. Gilmont, a minor, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed and Docketed: March 7, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 16394

MAYFLOWER INSURANCE EXCHANGE,
Appellant,

vs.

ARTHUR ALLEN McKINZIE, ROBERT DEAN
GILMONT, ROSE MARIE GILMONT, and
SUSAN ROSE GILMONT, a minor, ROB-
ERT RUSSELL GILMONT, a minor, and
NORMAN I. GILMONT, a minor, by RON-
ALD A. WATSON, Guardian ad Litem for
said minors, Appellees.APPELLANT'S DESIGNATION AND ADOPT-
TION OF STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Comes now appellant Mayflower Insurance Ex-
change and designates and adopts as its statement
of points upon which it will rely the statement of
points appearing in the typewritten record on file
herein, and further designates and adopts as its des-
ignation of record, the designation of record ap-
pearing in the typewritten record on file herein.

/s/ ARTHUR S. VOSBURG,

/s/ FRANK M. K. BOSCH,

Of Attorneys for Appellant, Mayflower Insurance
Exchange.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 13, 1959. Paul P.
O'Brien, Clerk.